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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1114.~~ 432 454 174

THE ST. PAUL & CHICAGO RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

SAMUEL McLEAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED FEBRUARY 3, 1880.

SUPREME COURT OF THE UNITED STATES.

No. 1114.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Southern District of New York, greeting:

Because in the record and proceedings, as also in the making and entering of certain orders of May 23d, 1879, and December 27th, 1879, in the said circuit court, before you, or some of you, in a suit or action therein pending between Samuel McLean, plaintiff, and the St. Paul & Chicago Railway Company, defendant, remanding the said suit or action from and out of the said circuit court to the court of common pleas for the city and county of New York, a manifest error hath happened, to the great damage of the said defendant, the St. Paul & Chicago Railway Company, as is said, and as appears by its complaint: we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the
2 United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this third day of January, in the year of our Lord one thousand eight hundred and eighty, and of the independence of the United States the one hundred and fourth.

[SEAL.] JOHN I. DAVENPORT,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ of error is allowed this 3d day of January, 1880.

SAM'L BLATCHFORD,
Circuit Judge.

3 (Endorsed:) U. S. circuit court. Samuel McLean *agt.* The St. Paul & Chicago Railway Co. Writ of error. C. W. Bangs, defendant's attorney.

Service of a copy of the within is hereby admitted without prejudice. N. Y., Jan. 3, 1880.

D. M. PORTER,
Plffs. Att'y.

Stamp—U. S. Circuit Court, Jan. 8, 1880. John I. Davenport, clerk.

UNITED STATES OF AMERICA,
Northern District of New York, ss:

4 I, John I. Davenport, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from five to 188 inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of Samuel McLean against the St. Paul and Chicago Railway Company, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-ninth day of January, in the year of our Lord one thousand eight hundred and eighty, and of the independence of the said United States the one hundred and fourth.

[SEAL.] JOHN I. DAVENPORT,
Clerk.

5 Court of Common Pleas in and for the city and county of New York.

SAMUEL MCLEAN, Plaintiff,
against
THE ST. PAUL AND CHICAGO RAILWAY COMPANY, Defendant. } Summons.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated January 31st, 1879.

D. M. PORTER,
Plaintiff's Attorney.

Office and post-office address, No. 3 Broad street, New York city.

6 Court of Common Pleas for the city and County of New York.

SAMUEL McLEAN, Plaintiff,
against
THE ST. PAUL AND CHICAGO RAILWAY COMPANY, Defendant

The plaintiff, for his complaint in the above-entitled action, and for a first cause of action, avers upon information and belief that the St. Paul and Pacific Railroad Company in the State of Minnesota was, during the entire year one thousand eight hundred and sixty-five, a corporation created by and existing under and pursuant to the laws of the State of Minnesota, and that on or about the 4th day of August, 1865, the said St. Paul and Pacific Railroad Company made and entered into a contract, duly signed and sealed with the corporate seal of said company and executed through its president and attorney-in-fact, with Henry Thornton and J. G. T. Child, who executed the same for themselves and their associate contractors, to wit, William Pickstone, Henry
7 Mann, and John B. Stephenson, under the name of Henry Thornton, J. G. T. Child, and their associates, of the city of Manchester, England, in and by which, among other things, said Henry Thornton, William Pickstone, Henry Mann, John B. Stephenson, and John G. T. Child were to grade the defendant's railroad from Winona to St. Paul, in the State of Minnesota, or to furnish the money therefor.

Plaintiff further says, upon information and belief, that thereafter, to wit, between the date of said contract and the 31st day of December, 1867, the said Thornton, Pickstone, Mann, Stephenson, and Child did perform work for and did furnish money to the defendant of the price and to the amount of fourteen thousand eight hundred and seventy pounds six shillings and three pence (£14,870 6s. 3d.) sterling, on which the current rate of exchange on London, England, was to be paid, which exchange so to be paid made the said sum equal to one hundred and five thousand dollars ($105,000) currency; and it was provided in and by said contract that if the said Thornton, Pickstone, Mann, Stephenson, and Child should, from any cause, be unable to comply with the provisions of the agreement with reference to the construc-
8 tion of the said railroad from Winona to St. Paul, that then the St. Paul and Pacific Railroad Company, now the St. Paul and Chicago Railway Company, as hereinafter stated, was to repay the said Thornton, Pickstone, Mann, Stephenson, and Child for all work that might be done or advances that might be made by them on account of the performance of said contract, and which work and labor and moneys advanced, of the price and to the amount aforesaid, were done and furnished in performance of said contract.

Plaintiff further says, upon information and belief, that after the said contract was made the name of the St. Paul and Pacific Railroad Company was duly changed to the St. Paul and Chicago Railway Company, the defendant herein, and which continues to be and is such corporation.

Plaintiff further says, upon information and belief, that thereafter, to wit, on or about the 9th day of June, 1868, the defendant and the said Thornton, Pickstone, Mann, Stephenson, and Child stated an account between each of them, and that there was found to be due and owing to the said Thornton, Pickstone, Mann, Stephenson, and Child, from the defendant, the said sum of fourteen thousand eight hundred and seventy pounds six
9 shillings and three pence (£14,870 6s. 3d.) sterling, with interest thereon at the rate of seven per cent. per annum from the 31st day of December, 1867, being with the current exchange on London, England, equivalent to the sum of one hundred and five thousand ($105,000) currency, with interest thereon from the 31st day of December, 1867, which account was stated between said last-named parties at such sum due from the defendant to the other parties to said contract.

Plaintiff further avers, upon information and belief, that on or about the 10th day of January, 1876, the said John B. Stephenson at the city of New York departed this life, leaving a last will and testament, and leaving Elizabeth F. Stephenson his executrix and sole legatee; that thereafter the said will was admitted to probate in the office of the surrogate of the city and county of New York, in the State of New York, where the said John B. Stephenson was a resident at the time of his decease, and letters testamentary were duly issued by the said surrogate to the said Elizabeth F. Stephenson as sole executrix of the last will and testament of John B. Stephenson, deceased, and she qualified as such, and continues to be such executrix.

10 Plaintiff further avers, upon information and belief, that on the said 9th day of June, 1868, the said John B. Stephenson was a resident of the city, county and State of New York, and that he was such resident at the time of his decease, and that the said Elizabeth F. Stephenson, his executrix, was at his decease and still is a resident of the city of New York, and that the plaintiff is a resident of the city of Brooklyn, county of Kings, and State of New York.

Plaintiff further says that thereafter, at the city of New York, on or about the 28th day of January, 1879, the owners and holders of said cause of action duly assigned, sold, transferred, and set over said cause of action to the plaintiff herein, and the plaintiff now owns and holds the same, and plaintiff states, upon information and belief, that no part of said sum of $105,000, with interest thereon from the 31st day of December, 1867, has been paid, but

the same remains due and owing to the plaintiff from the defendant.

The plaintiff, for a second cause of action, adopts all the allegations contained in the first cause of action, and makes the same a part of this cause of action, and avers, upon information and belief, that on or about the 9th day of June, 1868,
11 the defendant, under its corporal name and seal, made and entered into an agreement with the said Henry Thornton, William Pickstone, Henry Mann, John B. Stephenson, and John G. T. Child, under the name of J. G. T. Child, as follows, to wit:

This agreement, made by and between The Saint Paul & Chicago Railway Company, a corporation existing under the laws of the State of Minnesota, of the first part, and J. G. T. Child, of Manchester, England, of the second part, witnesseth:

Whereas on the 4th of August, 1865, at Manchester, aforesaid, Henry Thornton and the said party of the second part, entered into an agreement, in writing, with the St. Paul and Pacific Railroad Company, among other things, to furnish certain sums of money to aid in the construction of that part of the railroad of said company, extending from St. Paul to Winona, in said State, which said sums were accordingly furnished, and which, together with the interest thereon, and sundry sums expended by them in the interest of said company, it is agreed amount to the sum of fourteen thousand eight hundred and seventy pounds six shil-
12 lings and three pence, sterling, with interest, at seven per cent., from the 31st of December, 1867; and—

[U. S. five-cent. internal rev. stamp, cancelled.]

"Whereas, the said party of the first part, the St. Paul and Chicago Railway Company, is the successor in fact and in name of all the rights and liabilities of the said St. Paul and Pacific Railroad Company relating to the railway between St. Paul, Winona, and Iowa State line:

Now, therefore, in consideration of the premises, and of the discharge of all liability of the party of the first part hereto and of the said St. Paul and Pacific Railroad Company upon the said agreement of the 4th of August, 1865, which discharge has been duly executed by the said Child in person, and by the said Thornton by John B. Stephenson, his attorney in fact, the said party of the first part hereby agrees to deliver to the said Child their first mortgage seven per cent. land grant sinking fund bonds to the amount of one hundred and forty thousand dollars par value; and—

"Whereas, the said parties hereto, together with John B. Stephenson aforesaid, of Boston, Massachusetts, have entered into another agreement, bearing even date herewith, whereby the

13 said Child and the said Stephenson have agreed, for a valuable consideration, to furnish the party of the first part, at the city of New York, not exceeding eighteen hundred and fifty tons nor less than fifteen hundred tons of iron rails to be laid upon their railway, upon a credit of six months, and to be renewed if required for a further six and twelve months, making together eighteen months.

"Now, therefore, it is further agreed by the party of the second part, that the party of the first part have the right at any time, on or before the maturity of their acceptances as aforesaid for the purchase-money as aforesaid, upon the payment in sterling exchange equivalent to seventy-five cents to the dollar of the lawful money of the United States of the par value of said bonds, to require a return of said bonds, and he, the said Child, hereby binds himself thereupon to return the same.

"And in consideration of the premises it is further mutually agreed that if the said Child and Stephenson, the parties of the second part to the agreement hereinbefore referred to, shall fail to furnish the rails and deliver the same in New York as aforesaid, then and in that case no title to the one hundred and

14 forty thousand dollars of bonds is to pass to the said Child, and the same are to be returned by him to the said party of the first part, and the claim of the said Henry Thornton and the said Child is to remain at fourteen thousand eight hundred and seventy pounds six shillings and three pence, with interest at 7 per cent. from the 31st of December, 1867, as an ordinary claim for money furnished against the party of the first part.

"And it is further agreed that party of the first part in consideration of the premises will also deliver and pay over to said Child fourteen hundred shares of one hundred dollars each of the capital stock of the party of the first part, so soon as the same shall be discharged of the lien of the trust held by the Hon. William B. Ogden, of the city of New York.

"In witness whereof the party of the first part has caused the name of its president to be subscribed hereto and its corporate seal to be affixed, and the party of the second part has also subscribed his name and affixed his seal.

[U. S. five-cent internal rev. stamp cancelled.]

"Done at St. Paul the 9th day of June, 1868.

[Seal of the St. Paul & Chicago Railway Co.]

"EDMUND RICE,
"*President of the St. Paul & Chicago*
"*Railway Company.*

Duplicate.

"J. G. T. CHILD." [SEAL.]

15 That as the plaintiff is informed and believes at the same time and simultaneously therewith, and as a part of the

same transaction, the said defendant, under its corporate name and seal, made and entered into another agreement with the said Henry Thornton, William Pickstone, Henry Mann, John B. Stephenson, and John G. T. Child, under the name of J. G. T. Child and John B. Stephenson, as follows, to wit:

"This agreement, made by and between the St. Paul and Chicago Railway Company, a corporation existing under the laws of the State of Minnesota, of the first part, and J. G. T. Child, of Manchester, England, and John B. Stephenson, of Boston, Massachusetts, of the second part, witnesseth:

"That for a valuable consideration to them in hand paid, the parties of the second part hereby agree to purchase for the party of the first part, and cause to be delivered in the city of New York on or before the first day of October next, a quantity of iron rails, not exceeding eighteen hundred and fifty nor less than fifteen hundred tons, of not more than fifty-six pounds nor less than forty-five pounds weight to the lineal yard, at the market rates, upon a credit of six months, to be renewed if desired at six and twelve months, making together eighteen months; and for the payment of the purchase money thereof the party of the first part agree to give their acceptances as aforesaid, payable at the office of the Farmers' Loan and Trust Company, in the city of New York, with interest at the rate of seven per cent. sterling, and at the maturity thereof to renew the same as aforesaid, (in case they shall desire a renewal,) and thereupon to place as collateral thereto their first mortgage 7 per cent. land grant sinking fund bonds at the rate of seventy-five cents to the dollar, upon condition that if the rails, although delivered in New York on or before the first day of October next, cannot with ordinary diligence be transported to St. Paul in time to be laid between St. Paul and Hastings upon the railway before the maturity of the acceptance, then the renewal as aforesaid to be made and the delivery of the bonds as collateral to be deferred until the rails can be laid.

[U. S. five-cent internal rev. stamp cancelled.]

16

"It is understood that the vendors of the rails are to retain a lien thereon for the purchase money until the means have been provided by the party of the first part to complete the grading of the road-bed between St. Paul and Hastings; and further that the party of the first part reserve the option of paying their acceptances in advance of maturity, paying interest only for the credit used.

17

Done at St. Paul, June 9th, 1868.

In witness whereof the party of the first part has caused the name of its president to be hereunto subscribed and its corporate

seal to be affixed, and the parties of the second part have also subscribed their names and affixed their seals.

[Seal of the St. Paul & Chicago Railway Co.]

"EDMUND RICE,
"*President of the St. Paul & Chicago Railway Company.*

Duplicate.

"J. G. T. CHILD. [SEAL.]
"JOHN B. STEPHENSON. [SEAL.]

Plaintiff further avers upon information and belief that neither the said Thornton, Pickstone, Mann, Stephenson and Child, nor any of them, delivered the rails mentioned in the said contracts, or any part thereof, but such non-delivery of said rails was with the assent and at the request of the defendant; and said bonds were never delivered to them, nor to any of them, by the said St. Paul and Chicago Railway Company, the defendant herein;

18 and that the original sum agreed to be paid as aforesaid, to wit, the sum of one hundred and five thousand dollars, with interest thereon from the 31st day of December, 1867, became due and payable to the said Thornton, Pickstone, Mann, Stephenson, and Child.

Plaintiff further avers that on or about the 28th day of January, 1879, at the city of New York, the owners and holders of said cause of action duly assigned, sold, transferred, and set over this cause of action to the plaintiff herein, who now owns and holds the same; and the plaintiff states upon information and belief that no part of the sum of $105,000, with interest thereon from the 31st day of December, 1867, has been paid, but the same remains due and owing to the plaintiff from the defendant as aforesaid.

Wherefore, the plaintiff demands judgment against the defendant for the sum of one hundred and five thousand dollars, ($105,000,) with interest thereon from the 31st day of December, 1867, besides costs and disbursements in this action.

D. M. PORTER,
Plaintiffs' Attorney.

Office and Post Office address:
No. 3 Broad street, New York city.

19 CITY AND COUNTY OF NEW YORK, *ss:*

Samuel McLean, being duly sworn, deposes and says that he is the plaintiff in the above entitled action, and that the foregoing complaint is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

SAM. McLEAN.

Sworn to before me this 1st day of February, 1879.

JOHN S. SMITH,
Notary Public, N. Y. Co.

20 N. Y. Common Pleas.

SAMUEL MCLEAN
agt.
THE ST. PAUL & CHICAGO RAILWAY COMPANY.

The answer of the defendant in this action to the complaint of the plaintiff therein:

First. To the first cause of action stated in the complaint, the defendant answering admits that the St. Paul & Pacific Railroad Company was, during the entire year 1865 a corporation created by and existing under the laws of the State of Minnesota, and that on or about August 4th, 1865, the said company, under its corporate name, made and entered into a contract with Henry Thornton and J. G. T. Child, who executed the same for themselves and their associate contractors, viz: William Pickstone, Henry Mann and John B. Stephenson, under the name of Henry Thornton, J. G. T. Child and associates, of Manchester, England, of which contract a copy is hereto annexed marked "A"; but defendant denies that it entered into or executed with said Thornton, Child, Pickstone, Mann & Stephenson, or any or either of them, any other contract.

21 And the defendant admits that after said contract, of which a copy is hereto annexed, was made and entered into, but denies that after any other contract was made and entered into with said parties the name of the St. Paul & Pacific Railroad Company was duly changed to the St. Paul & Chicago Railway Company, which continues to be and is such corporation.

The defendant, while denying upon information and belief, that the only thing which the said contract provided, among other things, was that said Henry Thornton, J. G. T. Child and associates were to grade defendant's railroad from Winona to St. Paul, or to furnish the money therefor; admits and upon information and belief alleges that, among other things, the said Thornton, Child and associates were to locate, construct, equip and run a first-class railroad between the points named.

The defendant denies upon information and belief, that thereafter, between the date of said contract and December 31st, 4867, or at any other time, the said Thornton, Child and associates performed work for and furnished money to the defendant of the price and to the amount of fourteen thousand eight hundred and seventy pounds, six shillings and three pence sterling,

22 (£14,870 6 3,) or that on such alleged or any other amount the current rate of exchange on London, England, was to be paid, making the said sum equal to $105,000 currency; and upon information and belief the defendant alleges that said contractors last named wholly failed, neglected and omitted to per-

form the said contract according to the true intent and meaning and according to the terms thereof.

And this defendant, while admitting that it was agreed that, if said Thornton, Child, Pickstone, Mann and Stephenson should be unable from any cause to comply with the terms of the said agreement with reference to the construction of the railroad from Winona to St. Paul, the St. Paul & Pacific Railroad Co. was to repay all advances made on account of such performance; upon information and belief, denies that work was performed or moneys advanced, under or pursuant to said contract, of the price and to the amount alleged in the complaint, or to any other amount.

The defendant, upon information and belief, denies that on or about June 9th, 1868, there was an account stated between said Thornton, Child, their associates and this defendant; or that there was then or at any other time found to be due by the de-
23 fendant to said Thornton and his associates the sum of fourteen thousand eight hundred and seventy pounds, six shillings and three pence sterling, (£14,870 6 3,) with interest at the rate of seven per cent. per annum, from December 31st, 1867, equivalent at the current rate of exchange to the sum of one hundred and five thousand dollars, (105,000,) with interest at seven per cent. per annum from December 31st, 1867, or any other sum at any other rate of interest from any other time whatsoever.

Defendant admits, upon information and belief, that said John B. Stephenson died on or about the 10th day of January, 1876, but denies any knowledge or information sufficient to form a belief whether or not said Stephenson left a last will and testament, and whether or not Elizabeth F. Stephenson was left as his executrix and sole legatee; and defendant denies any knowledge or information sufficient to form a belief as to the admission of said will to probate and the issue of letters testamentary to said Elizabeth F. Stephenson as sole executrix of said last will and testament.

Defendant denies any knowledge or information sufficient to form a belief as to the plaintiff's place of residence or as
24 to the assignment, sale and transfer to him of said first cause of action by the holders and owners thereof alleged in the complaint to have been made.

This defendant admits that no part of said sum of one hundred and five thousand dollars, ($105,000,) with interest thereon, from December 31st, 1867, has been paid, but denies that the same remains due and owing to the plaintiff by the defendant.

To the second cause of action stated in the complaint, the defendant answering denies, upon information and belief, that on or about June 9th, 1868, the St. Paul and Chicago Railway Company made and entered into either of the further alleged con-

tracts, copies of which are set forth in the complaint, with said Thornton, Child, Pickstone, Mann, and Stephenson; but alleges, upon information and belief, that said contracts were not executed by the said railway company, nor by the authority thereof, and the same were and are not the acts and deeds, and that neither of them was or is the act or deed of said company.

The defendant admits that said Thornton, Child, and their associates did not deliver any iron rails, as required by said pretended contracts, but denies, upon information and belief,
25 that the performance of said contracts was waived by this defendant; and defendant admits that no bonds were delivered, as required by such alleged contracts to the parties last named, by this defendant; but the defendant denies that the original sum of one hundred and five thousand dollars, ($105,000,) with interest, from December 31st, 1867, mentioned in said alleged agreements, upon the failure thereof, became due and payable to the said Thornton, Child, and associates, by this defendant.

Defendant denies any knowledge or information sufficient to form a belief as to the assignment, sale, and transfer to the plaintiff of the said second alleged cause of action by the owners and holders thereof, which is alleged in the complaint to have been made.

Defendant admits that no part of the sum of $105,000, with interest, from December 31st, 1867, has been paid, but denies that the same remains due and owing by the defendant to the plaintiff.

Second. For a further and separate defence to the causes of action set forth in the complaint, the defendant says, upon information and belief, that on or about June 9th, 1868, by a mutual agreement by and between the St. Paul and Chicago Rail-
26 way Company and the said Thornton, Child, and associates, the contract first alleged in the complaint was rescinded, so far as to relieve and release the defendant from any further obligation to perform or comply with the same without releasing or discharging the claim which the said St. Paul and Pacific Railroad Company or the St. Paul and Chicago Railway Company then had against said Henry Thornton, J. G. T. Child, and their associates, for or by reason of the non-performance of the said contract of August 4th, 1865, by the last-named parties.

C. W. BANGS,
Defendant's Attorney.

CITY AND COUNTY OF NEW YORK, *ss:*

James M. McKinley, being duly sworn deposes and says that he is the president of the St. Paul and Chicago Railway Com-

pany, the defendant in this action; and that the foregoing answer is true, to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JAMES M. McKINLAY.

Sworn to before me, this 27th day of February, 1879.

WM. S. BAINTON,

(139) *Notary Public, N. Y. Co.*

27 "A."

"This agreement, made this fourth day of August, in the year one thousand eight hundred and sixty-five, (1865,) by and between the Saint Paul and Pacific Railroad Company, of the State of Minnesota, and the United States of America, of the first part, by Edmund Rice, their president and attorney in fact, and Henry Thornton, J. G. T. Child, and their associates, of the city of Manchester, England, of the second part: Witnesseth, whereas by an act of the Legislature of the Territory of Minnesota, approved on the 22d day of May, A. D. 1857, the Minnesota and Pacific Railroad Company was incorporated with full power to locate, construct, and operate a railroad from Winona, in said Territory, up the valley of the Mississippi river to Saint Paul, in said Territory, known as the Branch Railroad, from Winona to Saint Paul, and whereas by an act of the Legislature of the State of Minnesota, approved on the 10th day of March, A. D. 1862, the name of the said company was changed to the Saint Paul and Pacific

28 Railroad Company, and all the rights, privileges, franchises, lands, property, and interest granted by said Territory to the said Minnesota and Pacific Railroad Company were continued and granted to and vested in the said Saint Paul and Pacific Railroad Company; and whereas, by an act of the legislature aforesaid, approved on the 6th day of March, A. D. 1863, the said State of Minnesota did grant to the said Saint Paul and Pacific Railroad Company a quantity of lands belonging to said State and in said act described, amounting to about nine hundred thousand acres, to aid in the construction of said railroad from Winona to Saint Paul aforesaid; and whereas, by an act of the legislature aforesaid, approved on the 6th day of February, A. D. 1864, entitled 'An act to amend the charter of the Saint Paul and Pacific Railroad Company,' the said railroad company were authorized to create and issue in such manner and on such terms as it might deem expedient one or more classes of preferred stock and special stock, and to make such agreement as it might deem proper with the respective holders thereof as to the dividends thereon, and the securities for such dividends, and for the appropriation of the net earnings of any portion of the railroad

which it might construct or might acquire to the payment of dividends on such special stock, and for the administration of the portion of said railroad and the land grant appertaining thereto, to which said special stock might pertain, and for the separate organization of the holders of such special stock for the purpose of that administration, enabling them, or directors chosen by them, to exercise in respect to the portion of the railroad to which such stock shall pertain all the powers of the company; and whereas, for the purpose of constructing the said Branch Railroad from Winona to Saint Paul, the said Saint Paul and Pacific Railroad Company have, under the authority upon them conferred by the act above referred to, authorized and empowered said Edmund Rice, president and attorney of said
29 railroad as aforesaid, to issue thirty thousand shares of special stock of said company applicable and relative solely to said Branch Railroad certificates, of which stock the said president and attorney hath duly assigned and delivered to the said parties of the second part hereto: Now, therefore, in consideration of the premises, and of the covenants and conditions hereinafter contained on the part of the said parties of the second part to be performed, and of the sum of one dollar to it in hand paid, the said party of the first part does hereby covenant, promise, and agree to and with the parties of the second part as follows, that is to say:

First. That it, the said party of the first part, will never issue or permit to be issued in any manner any stock or certificate of stock, whether special, preferred or common, in any manner pertaining to or in anywise affecting the said Branch Railroad from Winona to Saint Paul other than those above described and set forth, the said party of the first part admitting hereby that all powers in that behalf conferred by said act are exhausted by the aforesaid issue.

Second. That it, the said party of the first part, will not convey by any deed or instrument of any kind whatsoever, or by any deed, instrument or act of any kind whatsoever, encumber in any manner the said Branch Railroad, or any right, privilege, franchise or power it may have over the same or any part thereof, and that in any future deed or mortgage or other instrument it may execute upon the general property or franchises of its road, the said Branch Railroad shall be especially excepted in fact and by name.

Third. That the holders and owners of the said special preferred stock, so issued as above set forth, shall have the exclusive right of administration and management of the said Branch Railroad from said Winona to Saint Paul; that all the power and authority possessed by the party of the first part, whether
30 for the location, construction and equipment or use of

the said railroad, is by these presents irrevocably conferred upon the holders and owners of such special stock, hereby giving to such owners and holders full power and authority to elect a board of directors and such other officers and agents as they may desire for the proper execution and exercise of the powers hereby conferred.

Fourth. That all the earnings of said Branch Railroad may be collected and received by the holders and owners of such special stock in such manner as they may prescribe and determine, and that the same may be applied to the payment of dividends on such special stock, or otherwise used, expended or appropriated in such manner as they the said stockholders may determine, without any liability for the same or any part thereof to the party of the first part, their successors or assigns.

Fifth. That the owners and holders of such special stock shall have exclusive management and control of all the lands granted by said State of Minnesota to said parties of the first part to aid in the construction of said Branch Railroad hereinbefore referred to, and full power and authority is hereby irrevocably conferred upon such owners and holders, their agents and attorneys, to enter upon and occupy the same, to procure title thereto in the manner prescribed in the said act, to bargain, sell and convey the same, either in the name of said party of the first part or otherwise, for such sum or sums of money or other consideration as to the said holders and owners of such stock may seem fit, without accounting to the party of the first part for any portion of the proceeds thereof, and without any liability therefor to any person whatsoever. The said party of the first part hereby relinquishing irrevocably to the owners and holders of such special stock all the powers and rights over the said lands, and the proceeds
31 thereof when sold that are now possessed by it or may be hereafter in any manner acquired.

Sixth. That in all elections for directors of said Branch Railroad, and in all other matters relating to the construction, management and use thereof, no stock or bondholder of the party of the first part shall have any right to vote by virtue of any stock or bonds he may own in the company of said party of the first part, and no owner or holder of any such special stock, or of any stock or bond hereafter issued by them, shall have any right to vote at any election of directors of the said party of the first part, or have any voice whatever in its management or use by virtue of any such special stock or bonds.

Seventh. That whenever hereafter in the location, construction or use of said Branch Railroad it should be necessary to use either the corporate name of the party of the first part, or to to have upon any written instrument the signature of any of its officers, or to use the corporate seal thereof, the same may be

used or shall be affixed upon the demand of the president, secretary or other proper officer or agent of such special stockholders or owners.

Eighth. That the said party of the first part shall do all proper things and use all proper influences to secure the proper and needed legislation in the State of Minnesota, to the satisfaction of the said owners and holders of such special stock, to enable them to construct, maintain and use the said Branch Railroad; and any and all grants, privileges or rights hereafter conferred upon the party of the first part, either by the Congress of the United States or by the Legislature of Minnesota, pertaining to said Branch Railroad, shall enure to the benefit of the said owners and holders the same as if such grant had been made directly to them.

Ninth. That any and all further contracts, agreements,
32 or acts required by the said owners and holders to be hereafter executed or performed by the said party of the first part to carry this agreement into effect, shall be fully executed upon reasonable and proper demand.

Tenth. That the owners and holders of such special stock, or the directors chosen by them, are hereby fully authorized and empowered to create or re-issue such amounts of capital stock, special or preferred, not exceeding in the aggregate three (3) millions of dollars of the said Branch Railroad as they may deem necessary or expedient, which stock shall be separate and distinct from any other capital stock of the party of the first part, and the owners and holders thereof shall have full power and authority to make, execute, issue and deliver bonds and obligations in any amount which said owners or holders may deem necessary or expedient to prescribe, the sum or sums for which each of said bonds shall be issued, the time and place where and when and person or persons to whom the principal and interest shall be payable, and the rate of interest which said bonds may bear. And to secure the payment of all or any of said bonds, all powers and authority conferred by the party of the first part, or by the laws of the State of Minnesota, to make, execute and deliver mortgages and deeds of trust upon any of the corporate franchises and property of the said Branch Railroad, are hereby conferred upon the said owners and holders of such special stock. That all certificates of stock and all other instruments in writing binding or in anywise affecting the said Branch Railroad, its franchises or property, shall be executed by such officers as the said special stockholders may direct, and the same right and authority to use the corporate seal of the party of the first part upon all instruments in writing relating or pertaining to said Branch Railroad is hereby conferred upon the said owners and holders of special stock as is possessed by the party of the

33 first part, and a copy of the die and stamp of said seal shall be furnished to said owners and holders for their own exclusive use. The said owners and holders of such special stock are hereby authorized and empowered to permit any holder of any such stock, bond or bonds to vote at any meetings held for the election of directors of said Branch Railroad, or for any other purpose, in such manner as the said owners and holders may determine.

Eleventh. That the said owners and holders of such special stock shall have such portion of the depot grounds of the said party of the first part at the city of St. Paul (estimated at forty (40) acres of land) as may be necessary for the proper management of the business of such Branch Railroad at that place, provided that the business interests of the party of the first part shall not be materially injured thereby, paying for all such lands as they may use, and as shall be actually conveyed to them the actual cost thereof to the party of the first part, not exceeding two hundred (200) dollars per acre, provided that so much of the island in the Mississippi river now occupied by the said party of the first part (which is hereby declared to contain $2\frac{18}{100}$ acres of land) for depot grounds and other purposes, as shall be conveyed to the said owners and holders, shall be paid for at such rate as may be agreed upon between the parties, not exceeding $25,000 per acre, all of said lands to be paid for in the first mortgage of the said Branch Railroad Company, or in such other manner as may be mutually agreed upon.

Twelfth. That in the construction of this agreement the owners and holders of any capital stock or bonds (if the owner of any such bonds are permitted to vote) that may hereafter be issued under the tenth paragraph hereof, shall be considered and held to be owners and holders of the special or preferred stock issued by the party of the first part as hereinbefore set forth.

34 *Thirteenth.* That the said party of the first part by these presents does hereby relinquish forever to the owners and holders of such special stock, to be exclusively used and exercised by them, in such manner and by such officers or agents as they may elect, so much of all their corporate rights, powers, privileges and franchises as pertain to that portion of their railroad extending from Winona to St. Paul aforesaid, hereby conferring upon them the right to exercise and use all the corporate rights, powers, privileges and franchises that are possessed by the party of the first part, so far as the same may affect the said branch railroad aforesaid.

And the said parties of the second part, in consideration of the the foregoing covenants and agreements on the part of the said party of the first part, to be performed, and of one dollar to them in hand paid, do hereby covenant and agree to and with the said party of the first part, as follows, that is to say:

First. That they will locate, construct and equip in the most economical manner, and run a first-class railroad, in all respects as required by the charter of the party of the first part, from Winona to St. Paul aforesaid, within the time that is now required by the charter of the said party of the first part, or by any other law of the State of Minnesota, (provided that the time now fixed by law shall not be lessened by any subsequent legislation of said State.) That they will commence the construction of such branch railroad at the city of St. Paul and proceed immediately, or as soon as practicable, from thence by the way of the town of Hastings, in said State, completing the first twenty miles of said branch railroad from St. Paul before the iron track thereof shall be laid below the said town of Hastings. It being distinctly understood and agreed that they will expend upon the grading of said branch railroad the sum of ten thousand pounds sterling during the present year, so that ten continuous miles thereof shall be graded ready for the superstructure, in compliance with the existing law of the State of Minnesota.

Second. It is also mutually covenanted and agreed by and between the parties hereto as follows, that is to say: That the parties of the second part will immediately proceed to elect a board of directors, who shall organize and elect proper officers of their board, and that there shall be by them also created and issued certificates for thirty thousand shares of capital stock in lieu of that assigned and delivered to the parties of the second part as aforesaid, which may be surrendered to said directors for cancellation; that ten thousand shares of said capital stock shall be set apart and allotted by said board of directors to the said parties of the second part, and that ten thousand shares shall be set apart and allotted for the specific disposal of the parties of the second part for the sole purpose of better enabling them to secure the construction of said branch railroad, and that the remaining ten thousand shares shall be allotted and delivered to Edmund Rice, president and attorney as aforesaid, for the use of said party of the first part: and that if any surplus shall remain of the ten thousand shares set apart as above to aid in the construction of said branch railroad after the construction of the same, it shall be distributed equally between the said parties of the second part and the said Edmund Rice, president and attorney as aforesaid.

Third. That said board of directors shall also proceed to execute and deliver a mortgage or deed of trust whereby said branch railroad and all the lands appertaining thereto and granted, or which may be granted, to aid in the construction thereof by the said State of Minnesota as aforesaid, and all the rights, property and effects appertaining to said branch railroad shall be conveyed in trust to one or more trustees to secure the pay-

ment of bonds which shall be issued in accordance with such terms as may be prescribed in such mortgage or deed of trust, and which bonds shall be in an amount sufficient in the aggregate to enable the parties of the second part, with the proceeds of the sale thereof, to construct and equip said branch railroad, it being the intention of the parties hereto that said branch railroad shall be built and equipped exclusively by the proceeds of the sale of the said bonds, and that no calls shall be made or assessments levied upon the shares representing said branch railroad, unless by reason of the impracticability of selling said bonds it shall become positively necessary to make such calls to enable said parties of the second part or the holders and owners of such shares to complete said branch railroad, and in the event of such call or assessment such holders and owners by responding thereto shall be entitled to have and receive such bonds in an amount equal at least to the call or assessment so paid.

Fourth. It is further agreed that said shares in no event shall be assignable on the books of said board of directors until said branch railroad shall have been constructed and put into operation.

Fifth. It is further agreed that said bonds, when created as above set forth, shall all be subject to the disposal of the parties of the second part at the best market price, and that after repaying themselves for the advances made or to be made all the proceeds of the sales of such bonds shall be held, deposited, used and paid out only for the construction and equipment of said branch railroad, and only upon estimates and vouchers therefor duly authenticated and audited. Salaries, commissions, printing, payment of trustee or trustees, interest and the incidental expenses connected with the organization of the board of directors and the execution of the trust imposed upon them to be in-
37 cluded, the advance made by the parties to the second part, or by the board of directors, to be repaid also from the proceeds of the sales of such bonds.

Sixth. The parties of the second part hereby further agree, in consideration of the premises, to pay to the party of the first part the sum of two thousand pounds sterling upon the execution of these presents. The parties of the second part also agree that they will cause to be paid to Edmund Rice, president and attorney as aforesaid, or to his order, for the use of the party of the first part, the sum of thirty thousand pounds sterling, said sum to be paid by instalments, but not to the prejudice of the construction of said branch railroad during its said construction, so as to embarrass or delay the construction thereof, and such payments may be either made in cash or in the bonds above referred to at their cash market value.

Seventh. It is further agreed that the parties of the second part hereby assume to accept and conform to the provisions of the

agreement made by and between the parties of the first part and A. B. Smith and Z. G. Simmons for the construction, maintenance and operation of an electric telegraph along the line of said branch railroad, and dated September 21st, 1863.

Eighth. That mutual and exclusive close running connection between the said branch railroad from Winona to Saint Paul, and all the railroads of the party of the first part as to the transportation of freight and passengers and the transaction of all business over all the respective lines of railroad north of or leading into Saint Paul, shall be agreed upon and entered into. The contract for such connection shall be hereafter more fully, explicitly and in detail drawn up and mutually executed by the parties, the terms thereof shall be arranged by the superintendents of the respective roads, and in case of their disagreement upon the terms thereof, the same shall be referred to Captain
38 Wm. H. Swift; and in case of his demise or refusal to act, then the same shall be referred to Samuel J. Tilden, Esquire, of New York, the decision of either of whom shall be final and conclusive upon all the parties hereto.

Ninth. That the title is to so much of the depot grounds, hereinbefore referred to, as shall be used by the said parties in common in their said business, shall be held in common by said parties as tenants in common, and shall be owned by them as such. The passenger and transfer freight depots on such depot ground, when more convenient for joint and common use, shall be erected in common, according to plans to be agreed upon by the superintendents of the respective roads, each party paying an equitable and proportionate share of the expenses of such improvements, in proportion to the respective use made by each party thereto. But nothing herein contained shall be construed to prevent either of said parties from erecting and maintaining all separate and necessary passenger and freight depots, cattle-yards, car-shops, engine-houses or other necessary buildings and structures on such depot grounds at Saint Paul, as either party may find their business and convenience may require, provided that the said owners and holders of said special stock shall not be required to pay for more of said depot lands at Saint Paul than shall be conveyed to them, being not less than one moiety thereof, by an absolute conveyance, conveying to them the fee thereof.

Tenth. It is further mutually covenanted and agreed by and between the said parties hereto, that the covenants and agreements herein contained on the part of the parties of the second part, to be performed other than the payment of the two thousand pounds sterling, and the grading of ten at least consecutive miles of railway, by the expenditure of not less than ten
39 thousand pounds sterling for that purpose, during the present year, shall not be construed or held to create any other

or greater liability on their part, or on the part of any of the holders of any of the stock or bonds thereof, than to use their utmost exertions in good faith to secure the construction of said branch railroad according to the terms of this agreement. That if any contingency should arise, whether from derangement of finances or otherwise, rendering it impossible for the parties of the said part to complete the said branch railroad, as required by the terms hereof, no liability shall be held to have been incurred by them or by their successors or assigns, to the party of the first part, or to any other persons for any loss suffered, or damages of any kind sustained, because of the failure of the parties of the second part, their successors or assigns, to perform any or all of the covenants and agreements herein contained, on their part to be performed, other than as hereinbefore excepted.

Eleventh. It is further agreed that upon the ratification of this agreement by the stockholders of the party of the first part, the maps, profiles, field notes and other papers relating to the Branch Railroad from Winona to St. Paul be transferred and delivered to the party of the second part or to their authorized agent.

It is further agreed that in case from any cause the parties of the second part are unable to comply with the provisions of this agreement with reference to the construction of said Branch Railroad, from Winona to Saint Paul, and the franchises and property connected with the same shall revert to the party of the first part, the party of the first part will repay to the party of the second part any and all advances that shall have been made on account of the same, and will secure the repayment thereof, either by note, bond, bill or such other obligation, and with such security as they are able to make, and as may be mutually agreed upon.

Twelfth. And whereas, it is desirable that the entire line of the Saint Paul and Pacific Railroad Company, from Winona to Saint Paul, and thence from Saint Paul to Watab and to Pembina, with the lateral branch to the west end of Lake Superior, and from Saint Paul to Stillwater, shall become one entire consolidated line.

And whereas, that portion of the line from Saint Paul to Watab, is operated and controlled in virtue of special preferred stock issued under an act of the Legislature of the State of Minnesota, and which is held mainly by parties other than the parties of the first part, but who are desirous of re-transferring the same to the parties of the first part for such proper and fair consideration as may be mutually agreed upon.

Now, therefore, it is further agreed that if such re-transfer can and shall be obtained by either or all of the parties to this agreement, it is the mutual intention and understanding that the same shall be obtained and become a part of the consolidated line.

The parties of the second part shall also be at liberty to have, and it is their intention to take the shares or stock representing the line of road from Watab to Pembina, including the lateral branch to the West end of Lake Superior and the road from Saint Paul to Stillwater, upon the terms hereinafter mentioned, but it is distinctly understood and desired that the parties of the first part shall use their best endeavors to enlist American capital to aid in carrying out the object embraced in this paragraph, and the efforts of the parties of the second part shall be directed to the same end, unless they see their way clear to a consummation of the project without such aid.

The party of the first part retaining thirty-three and one-third per cent. (33⅓) of the shares, and which shares are to stand upon the same footing as the shares relating to the road from Winona to Saint Paul.

This agreement is subject to the ratification of the stockholders of the party of the first part.

Done in duplicate at the city of Manchester, England, on the day and year first above written.

(Signed) EDMUND RICE,
Pres. and Atty. St. Paul & Pacific R. R. Co.
HENRY THORNTON.
J. G. T. CHILD.

41 (Endorsed:) N. Y. common pleas. Samuel McLean agt. The St. Paul and Chicago Railway Co. (Copy.) Pleadings. C. W. Bangs, deft's att'y. U. S. circuit court, filed April 10, 1879. John I. Davenport, clerk.

42 Court of common pleas, city and county of New York.

SAMUEL MCLEAN
against
THE ST. PAUL AND CHICAGO RAILWAY COMPANY.

To the court of common pleas of the city and county of New York:

The petition of the St. Paul and Chicago Railway Company in the above entitled action respectfully represents that an action has been commenced in the court of common pleas for the city and county of New York by Samuel McLean against your petitioner, the St. Paul and Chicago Railway Company, and that the said company is, and is alleged in the complaint, to be a corporation created and existing under and by virtue of the laws of the State of Minnesota, and that it is alleged in the complaint
43 that the plaintiff is a resident of the city of Brooklyn, county of Kings, and State of New York; and the plaintiff is, as your petitioner is informed and believes, a citizen of the

State of New York, and the defendant corporation is a citizen of the State of Minnesota, and that the matter in dispute in this action exceeds, exclusive of costs, the sum of value of five hundred dollars; said action was commenced on the 7th day of February, 1879, and the defendant has appeared therein in this court and answered the said complaint, and the said action has not yet been tried, nor has there been any term of this court since the said action was commenced at which the same could be tried.

Wherefore your petitioners pray that the said suit may be removed from the said court of common pleas to the circuit
44 court of the United States for the southern district of New York, and that this court will proceed no further in this action.

Dated March 3d, 1879.

St. Paul and Chicago Railway Company,
By JAMES M. McKINLAY,
President.

[SEAL.] C. W. BANGS,
Defendant's Attorney.

CITY AND COUNTY OF NEW YORK, *ss:*

James M. McKinlay, being duly sworn, deposes and says that he is the president of the St. Paul and Chicago Railway Company, the defendant in the above-entitled action and the petition above named, and that the foregoing petition is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JAMES M. McKINLAY.

Sworn to before me, this 4th day of March, 1879.
THOS. W. FITZGERALD,
Notary Public in Richmond County,
Certified in New York County.

45 (Endorsed:) N. Y. common pleas. Samuel McLean ag'st the St. Paul and Chicago Railway Co. Copy petition for removal of action, &c. C. W. Bangs, deft's attorney.

46 Know all men by these presents, that the St. Paul and Chicago Railway Company and Russell Sage, of the city of New York, as surety, are held and firmly bound unto Samuel McLean, of the City of Brooklyn, Kings county, New York, in the sum of five hundred dollars, lawful money of the United States, to be paid to the said Samuel McLean, his executors, administrators, and assigns, for which payment well and truly to be made the said St. Paul and Chicago Railway Company binds itself, and the said Russell Sage binds himself jointly and severally firmly by these presents.

Sealed with the seals of the said St. Paul and Chicago Railway Company and of the said Russell Sage, the fourth day of March, 1879.

Whereas the said Samuel McLean, a citizen of the State of New York, has commenced an action in the Court of
47 Common Pleas for the city and county of New York against the St. Paul and Chicago Railway Company, a citizen of the State of Minnesota, and the matters in dispute in said action exceed, exclusive of costs, the sum of five hundred dollars, and the said action involves a controversy between citizens of different States, and the said St. Paul and Chicago Railway Company desire the removal of the said suit into the circuit court of the United States for the southern district of New York, and have made and are about to file in the said Court of Common Pleas for the city and county of New York, in the said suit, a petition for the removal of the said suit into the said circuit court of the United States for the southern district of New York, in which district the said suit is pending.

Now, therefore, the condition of this obligation is such
48 that if the said St. Paul and Chicago Railway Company shall enter in said circuit court on the first day of its next session a copy of the record in said suit of the said Samuel McLean against the said St. Paul and Chicago Railway Company in the said Court of Common Pleas, and shall pay all costs that may be awarded by the said circuit court if the said circuit court shall hold that said suit was wrongfully or improperly removed thereto, and if the said St. Paul and Chicago Railway Company shall there appear and enter special bail in such suit, if special bail was originally requisite therein, then this obligation to be void; otherwise to remain in full force and virtue.

St. Paul and Chicago Railway Company, [SEAL.]
By JAMES M. McKINLAY,
President.
RUSSELL SAGE. [SEAL.]

Sealed and delivered in the presence of—
C. B. TERRY,
WM. S. BAINTON, as to Russell Sage.

49 CITY AND COUNTY OF NEW YORK, *ss*:

On the 4th day of March, 1879, before me personally came James M. McKinlay, to me known and known to me to be the same person who signed and executed the foregoing instrument as the president of the St Paul and Chicago Railway Company, and having been by me duly sworn, did depose and say acknowledge that he executed said instrument in the name of the said St. Paul and Chicago Railway Company as the president of the said company, and on behalf of and as the act and deed of

the said St. Paul and Chicago Railway Company, and that he executed the same under authority pertaining to his office as president of the said company, and that he, the said James M. McKinlay, was and is the president of the said company, and that the seal affixed to said instrument is the corporate seal of said St.
50 Paul and Chicago Railway Company and was affixed thereto by authority of said company.

THOS. W. FITZGERALD,
Notary Public Rich Co., cer. filed in N. Y. Co.

CITY AND COUNTY OF NEW YORK, *ss:*

On this seventh day of March, 1879, before me personally came Russell Sage, to me known to be the same person described in and who executed the foregoing instrument, as the surety therein named, and acknowledged to me that he executed the same.

WM. S. BAINTON,
(139) *Notary Public, N. Y. Co.*

(Endorsed:) N. Y. Common Pleas. Samuel McLean agst. The St. Paul & Chicago Railway Company. Copy bond on removal of cause, &c. C. W. Bangs, def'ts att'y.

51 At a special term of the court of common pleas for the city and county of New York, held at the court house in the city of New York, on the 17th day of March, 1879.

Present: Hon. Richard L. Lanemore, J.

SAMUEL MCLEAN
vs.
THE ST. PAUL AND CHICAGO RAILWAY COMPANY.

It appearing by the complaint in this action that the defendant, the St. Paul and Chicago Railway Company, is a corporation created under and by virtue of the laws of the State of Minnesota, and that the plaintiff is a resident of the State of New York, and the said defendant having, before the term at which this
52 cause could be first tried in this court, made and filed a petition in this suit in this court, whereby it appears that the plaintiff in this action is a citizen of the State of New York, and that the defendant is a citizen of the State of Minnesota, and that pursuant to the second and third sections of the act of the Congress of the United States, approved March 3, 1875, this being an action between citizens of different States, and the matter in dispute, exclusive of costs, exceeds the sum of value of $500, the defendant having prayed for the removal of this suit into the circuit court of the United States for the southern district of New York, and having made and filed with the said petition a bond with good and sufficient surety for the defendant entering, in said

circuit court on the first day of its next session, a copy
53 of the record of such suit in this court, and for paying all costs that may be awarded by the said circuit court of the United States, if the said court shall hold that this suit was wrongfully or improperly removed thereto, and also for the appearing and entering special bail in such suit, if special bail was originally requisite therein.

Now, on reading and filing a copy of the pleadings in said action in this court, and the said petition and bond and proof of service of a copy thereof, and of notice of application for this order on the attorney for the plaintiff, and on motion of Mr. C. W. Bangs, attorney for the defendant in this action, no one appearing to oppose—

It is ordered that the said petition and bond be accepted and filed, and that this court will proceed no further in the suit, and it is hereby declared that the said suit is removed to the
54 said circuit court of the United States for the southern district of New York.

Enter. R. L. L.

STATE OF NEW YORK,
City and County of New York, ss:

I, Nathaniel Jarvis, Jr., clerk of the court of common pleas, for the city and county of New York, do hereby certify that I have compared the foregoing copies, petition, bond, and order, with the originals thereof on file in my office, and that the same are correct copies thereof, and of the whole of the said originals.

In witness whereof I have hereto set my hand and official seal, March 18, 1879.

[SEAL.]

NATH'L JARVIS, Jr.,
Clerk.

55 Endorsed: N. Y. common pleas. Samuel McLean agst. The St. Paul and Chicago Railway Company. Certified copy, petition, bond, and order declaring cause removed to United States circuit court, &c. C. W. Bangs, def'ts att'y. U. S. circuit court, filed April 10, 1879. John I. Davenport, clerk.

56 Circuit court of the United States, southern district of New York:

SAMUEL MCLEAN
vs.
THE ST. PAUL & CHICAGO RAILWAY COMPANY.

Upon reading and filing a copy of the record and pleadings

and proceedings in the above-entitled action in the court of common pleas of the city and county of New York, and a certified copy of the petition and bond of the defendant for the removal of said action to this court, filed in said court of common pleas, and of the order of said court of common pleas made in said action on the 17th day of March, 1879, accepting said bond, and ordering the same and said petition to be filed, and declaring said action to be removed to this court, and that said
57 court of common pleas would proceed no further therein; now, on motion of Mr. C. W. Bangs, attorney for said defendant, the St. Paul and Chicago Railway Company, it is ordered that the appearance of said defendant in this court be and the same is hereby entered; and that this action proceed in this court as if originally commenced therein.

58 In the circuit court of the United States for the southern district of New York.

SAMUEL MCLEAN, Plaintiff,
against
THE ST. PAUL AND CHICAGO RAILWAY COMPANY, Defendant.

SIR: Take notice that upon the summons, complaint, answer, petition, and bond for removal, and the order made thereon purporting to remove this action from the Court of Common Pleas for the city and county of New York into this court and the record from the Court of Common Pleas for the city and county of New York, the notice of appearance, and all the other papers heretofore served or filed in this action, and the affidavit of D. M. Porter, a copy of which is herewith served upon you, a motion will be made at a circuit court of the United States for the southern district of New York, to be held in the court-room thereof in the new post office building, in the city of New York, on the 18th day of April, 1879, at 11 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, that the above-entitled action be remanded from this court to the Court
59 of Common Pleas for the city and county of New York, with costs, and for an order to that effect.

Dated New York, April 14, 1879.

Yours, &c.,

D. M. PORTER,
Plaintiff's Attorney.

To C. W. BANGS, Esq.,
Defendant's Attorney.

60 In the circuit court of the United States for the southern district of New York.

SAMUEL McLEAN, Plaintiff,
against
THE ST. PAUL AND CHICAGO RAILWAY COMPANY, Defendant.

CITY, COUNTY, AND STATE OF NEW YORK.

D. M. Porter, being duly sworn, deposes and says that he is the attorney for the plaintiff in the above-entitled action; that this action was commenced in the Court of Common Pleas for the city and county of New York, and that the defendant answered in said action on the 27th day of February, 1879; that issue herein was created of that day, which constitutes the present issue in this action; that thereafter, on the 8th day of March, 1879, a petition and bond, with notice of application for an order to remove this action from the said court into this court, was served on plaintiff's attorney in this action; that thereafter, on or about the 17th day of March, 1879, an order directing the removal of this action from the said Court of Common Pleas for the city and county of New York into this court was made and entered in the office of the clerk of said Court of Common Pleas,
61 and it, with the petition, bond, and other papers upon which the same was granted were, on the last-mentioned day, filed in the office of the clerk of the Court of Common Pleas for the city and county of New York, in the court-house in the city and State of New York, and the application for such removal was then and there made; and the first day of the next session of the circuit court of the United States for the southern district of New York was the 7th day of April, 1879, to wit, within twenty days after the said application for the removal of this action, but that the defendant, who procured such removal, did not, within twenty days from the time of the said application, file in this court a copy of the record and enter his appearance in this action, but omitted to do so, and the same was not done until the 10th day of April, 1879, although he procured a copy of the record to be certified on the 18th day of March, 1879, as appears from the certificate on file in this court.

D. M. PORTER.

Sworn to before me, this 14th day of April, 1879.
[SEAL.] GEORGE W. KRACHT,
Notary Public, N. Y. Co.

62 (Endorsed:) U. S. circuit court. Samuel McLean against The St. Paul and Chicago Railway Company. Affidavit and notice of motion to remove, &c. D. M. Porter, plff's attorney, No. 3 Broad street, New York. Service of a

copy of the within is admitted April 14, 1879. C. W. Bangs, deft's atty. The motion herein to remand cause, &c., is hereby adjourned, by consent, to Friday, April 25th, 1879, same time and place. N. Y. April. U. S. circuit court. Filed May 14, 1879. John I. Davenport, clerk.

63 United States circuit court southern district of New York.

SAMUEL MCLEAN
vs.
THE ST. PAUL AND CHICAGO RAILROAD COMPANY.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles W. Bangs, being duly sworn, deposes and says that he is the attorney for the defendant in the above-entitled action, and deponent says that it is true that on the 17th day of March instant, a petition and bond for the removal of this action from the court of common pleas of the city and county of New
64 York to this court was filed in said court of common pleas and an order thereupon made by said court accepting said petition and bond, and declaring that the said court would proceed no further in said cause, and that said cause was removed to this court; and deponent says that by inadvertence, during his (deponent's) absence from his office on the 7th of April instant, the record in said cause of the said proceedings in the court of common pleas of the city and county of New York in the said action, and a copy of the pleadings therein was not filed in this court on that day, and that deponent did not discover that
65 the same had not been filed until the 10th instant, whereupon deponent filed the said record in this court and entered the appearance of the said defendant in this court by this deponent, as its attorney in this cause in this court, and entered a rule that this action proceed in this court as if originally commenced therein, of which notice was given to the attorney for the plaintiff on the 10th instant.

C. W. BANGS.

Sworn to before me, this 18th day of April, 1879.
[SEAL.] HENRY J. THORNTON,
Notary Public No. 87, City and County of New York.

(Endorsed:) U. S. circuit court. Samuel McLean ag't The St. Paul and Chicago Railway Co. Deft's affidavit to oppose motion to remand, &c. C. W. Rangs, deft's atty. U. S. circuit court, filed May 14, 1879. John I. Davenport, clerk.

66 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court rooms, in the city of New York, on the twenty-fifth day of April, in the year

of our Lord one thousand eight hundred and seventy-nine. Present: the Honorable Samuel Blatchford, circuit judge.

SAMUEL McLEAN
vs.
CHICAGO AND ST. PAUL RAILWAY COMPANY.

A motion in the above cause to remand same to the New York court of common pleas coming on this day to be heard, the said motion is submitted by counsel for respective parties.

67 Circuit court of the United States for the southern district of New York.

SAMUEL McLEAN
vs.
THE ST. PAUL AND CHICAGO RAILWAY COMPANY.

BLATCHFORD, J. On the 7th of February, 1879, this suit was commenced in the court of common pleas for the city and county of New York, by the service of a summons. A complaint was afterwards put in in the State court which demands judgment against the defendant for $105,000. The complaint, which is sworn to February 27th, 1879, sets forth that the plaintiff "is a resident of the city of Brooklyn, county of Kings, and State of New York." The defendant is a corporation created by the State of Minnesota. On the 17th of March, 1879, the State court made an order in the cause, in these words: "It appearing by
68 the complaint in this action, that the defendant, the St. Paul and Chicago Railway Company, is a corporation created under and by virtue of the laws of the State of Minnesota, and that the plaintiff is resident of the State of New York, and the said defendant having, before the term at which this cause could be first tried in this court, made and filed a petition in this suit, in this court, whereby it appears that the plaintiff in this action is a citizen of the State of New York, and that the defendant is a citizen of the State of Minnesota, and that, pursuant to the second and third sections of the act of Congress of the United States, approved March 3d, 1875, this being an action between citizens of different States, and the matter in dispute, exclusive of costs, exceeds the sum of value of $500, the defendant having prayed for the removal of this suit into the circuit court of the United States for the southern district of New York, and having made and filed with the said petition a bond with good and sufficient
69 surety for the defendant entering in said circuit court, on the first day of its next session, a copy of the record of such suit in this court, and for paying all costs that may be

awarded by the said circuit court of the United States, if the said court shall hold that this suit was wrongfully or improperly removed thereto, and also for the appearing and entering special bail in such suit, if special bail was originally requisite therein, now, on reading and filing a copy of the pleadings in said action in this court, and the said petition and bond and proof of service of a copy thereof, and of notice of application for this order, on the attorney for the plaintiff, and on motion of Mr. C. W. Bangs, attorney for the defendant in this action, no one appearing to oppose, it is ordered that the said petition and bond be accepted and filed, and that this court will proceed no further in this suit, and it is hereby declared that the said suit is removed to
70 the said circuit court of the United States for the southern district of New York." The petition to the State court is dated March 3, 1879, and sworn to the next day. It sets forth that the defendant "is, and is alleged in the complaint to be, a corporation created and existing under and by virtue of the laws of the State of Minnesota, and that it is alleged in the complaint that the plaintiff is a resident of the city of Brooklyn, county of Kings, and State of New York, and the plaintiff is, as your petitioner is informed and believes, a citizen of the State of New York, and the defendant corporation is a citizen of the State of Minnesota." The bond referred to in said order contains this recital: "Whereas the said Samuel McLean, a citizen of the State of New York, has commenced an action in the court of common pleas for the city and county of New York against
71 the St. Paul and Chicago Railway Company, a citizen of the State of Minnesota, * * * and the said action involves a controversy between citizens of different States."

The first day of the next session of this court after the 17th of March, 1879, was the 7th of April, 1879. The defendant did not file a copy of the record in the suit in this court, on the 7th of April, nor did it enter an appearance in this court in this suit on the 7th of April, nor until the 10th of April, on which latter day it did file in this court a copy of such record, and enter its appearance in this suit in this court, and enter a rule in this court that this action proceed in this court as if originally commenced therein, of which notice was given to the plaintiff's attorney on the 10th of April.

The plaintiff now moves this court to remand this cause to the State court, on two grounds: (1.) Because the proceed-
72 ings for removal do not show that at the commencement of the suit the plaintiff was a citizen of the State of New York, but only show that the plaintiff was a citizen of the State of New York at the time the defendant applied to remove the cause: (2.) Because the record was not filed in this court until the 10th of April.

In Insurance Co. *vs.* Pechner, (5 Otto, 183,) a petition for removal, on the ground of citizenship, was presented to the State court, under § 12 of the act of September 24th, 1879, (1 U. S. Stat. at Large, 79,) which provided that "if a suit be commenced in any State court" "by a citizen of the State in which the suit is brought against a citizen of another State," "and the defendant shall, at the time of entering his appearance in such State court, file a petition for the removal of the cause for trial into the next circuit court," "it shall then be the duty of the State
73 court to" "proceed no further in the cause." The petition was dated ten days after the suit was commenced, and was sworn to the next day after its date, and it was presented to the State court at the time the appearance of the defendant was entered in that court. The statement of the petition as to the citizenship of the plaintiff was that the plaintiff "is a citizen of the State of New York." The State court denied the application for removal. The plaintiff had a judgment. The case went to the court of appeals of New York, which held (Pechner *vs.* Phœnix Ins. Co., 65 N. Y., 195) that the State court had a right to proceed with the cause, because the petition for removal did not show that the plaintiff was a citizen of the State of New York when the suit was commenced. The case was then taken to the Supreme Court of the United States. That Court held that § 12 of the act of 1789, in the language above quoted, had reference to the citizenship of the parties when the suit was
74 begun. It added, "The phraseology employed in the acts of 1866, 14 Stat., 307, 1867; id., 558; and 1875; 18 id., 470; and in the Revised Statutes, sec. 639, is somewhat different, and we are not now called upon to give a construction to the language there used. As to the act of 1879, we entertain no doubt in this particular. This right of removal is statutory. Before a party can avail himself of it, he must show, upon the record, that his is a case which comes within the provisions of the statute. It is petition for removal, when filed, becomes a part of the record in the cause. It should state facts which, taken in connection with such as already appear, entitle him to the transfer. If he fails in this he has not, in law, shown to the court that it cannot "proceed further with the cause." Having once acquired jurisdiction, the court may proceed until it
75 is judicially informed that its power over the cause has been suspended. It remains only to apply this rule to the facts as they appear in this record. The suit was commenced June 1, 1867. At that time there was nothing in the pleadings or process to indicate the citizenship of the plaintiff. The defendant, in its petition for removal, bearing date June 11, simply stated that the plaintiff is—that is to say, was at that date—a citizen of New York. This, certainly, is not stating, affirma-

tively, that such was his citizenship when the suit was commenced. The court had the right to take the case as made by the party himself, and not inquire further. If that was not sufficient to the jurisdiction there was no reason why the court might not proceed with the cause. We think, therefore, that the court of appeals did not err in its decision."

76 As there was nothing before the State court in this case, and there is nothing before this court to show that the plaintiff was a citizen of the State of New York when this suit was commenced, it follows that this court would have no jurisdiction of this suit if the removal were sought under a statute worded as is section 12 of the judiciary act of 1789. But the order of removal shows that the State court regarded the case as one of removal under sections 2 and 3 of the act of March 3, 1875, (18 U. S. Stat. at Large, 470, 471.) Section 2 of that act provides "that any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court * * * in which there shall be a controversy between citizens of different States * * * either party may remove said suit into the circuit of the United States for the proper district." Section 3 of that

77 act provides "that whenever either party * * * entitled to remove any suit mentioned in the next preceding section shall desire to remove such suit from a State court to the circuit court of the United States, he or they may make and file a petition in such suit in such State court * * * for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record of such suit * * * and also for there appearing * * * in such suit, * * * it shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit; * * * and the said copy being entered as aforesaid in said circuit court of the United States,

78 the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court."

The defendant contends that under the act of 1875 it is not necessary, in order to a removal in the present case, that it should appear that the parties were citizens of different States when the suit was commenced.

The act of March 2, 1867, (14 U. S. Stat. at Large, 558,) provided "that where a suit is now pending or may hereafter be brought in any State court, in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State, * * * such citizen of another State, whether he be plaintiff or defendant, if he will make and file, in such court, an affidavit stating * * * may, at any time be-

fore the final hearing or trial of the suit, file a petition in such State court for the removal of the suit into the next circuit
79 court of the United States to be held in the district where the suit is pending, and offer good and sufficient * * * and it shall be, thereupon, the duty of the State court to accept the surety and proceed no further in the suit."

In Johnson *vs.* Monell (1 Woolworth, 390) the plaintiff, being a citizen of Iowa, brought a suit in a State court of Nebraska against a citizen of Nebraska. During the pendency of the suit the plaintiff became a citizen of Nebraska, and the suit was tried in the State court, while both of the parties were citizens of Nebraska. The plaintiff had a verdict. A new trial was granted on the application of the defendant. The plaintiff having again and voluntarily became a citizen of Iowa, then petitioned, under the act of 1867, for the removal of the suit into the circuit court of the United States for the district of Nebraska, the defendant having remained throughout and being still a citizen of
80 Nebraska. The State court made an order removing the cause, and the defendant then moved the circuit court to dismiss the case or remand it to the State court, for want of jurisdiction. The motion was heard before Mr. Justice Miller and Judge Dundy. The court held that the act of 1867 was within the constitutional power of Congress. The court then proceed, Mr. Justice Miller delivering the opinion: "The next question is, whether the fact that, pending the litigation in the State court, the plaintiff changed his citizenship from Nebraska to Iowa stands in the way of the removal of the cause? The act does not in terms prescribe the time at which the citizenship of the moving party must be acquired. Nor is there anything from which to imply that a time was intended to be limited in that regard. Had Congress intended to confine the privileges of the act to parties who were citizens of different States at the
81 commencement of the suit, it would have been very easy to have provided. It did not see fit so to do. On the other hand, in express terms, or, at least, by the strongest implication, it provided otherwise. The language is, 'Where a suit is now pending, or may hereafter be brought, in any State court in which there is a controversy between a citizen,' &c., which is as much as to say, whenever a controversy shall arise in a suit pending in a State court, the parties to which shall at any time be citizens of different States, the cause may be removed. No time at which the citizenship shall be acquired is limited. So, the inference is, that it may be acquired at any time. Nor is the case changed by the circumstance that the citizenship in Nebraska was abandoned and that in Iowa acquired voluntarily, or even for the purpose of securing the right of removal. It has been re-
82 peatedly held that the fact that a party had removed from

one State to another in order to be able to bring his suit in the Federal court, did not affect the jurisdiction." The conclusion of the court was that Congress intended, in reference both to plaintiffs and defendants, to confer the right of removal from the State court at any stage of the proceedings before the final trial was begun, and when the requisite citizenship was found to exist, on the making of the proper affidavit and the giving of the required bond. In the particulars involved in the suit now before us the provisions of the act of 1875 are like those of the act of 1867. This suit is within the terms of § 2 of the act of 1875. It is a civil suit, brought in the State court after the passage of the act of 1875, the matter in dispute exceeds the requisite amount, and there is a controversy in it between citizens of different States.

83 The petition and bond were in proper form. The State court accepted them and made the order of removal. The expression in the act of 1875, "any suit now pending or hereafter brought, in which there shall be a controversy between citizens, either party may remove it," is in the same form, and must have the same meaning, in respect to the point now under consideration, as the expression in the act of 1867, "where a suit is now pending or may hereafter be brought, in which there is controversy between a citizen and a citizen, the latter citizen, whether plaintiff or defendant, may file a petition for the removal of the suit." The observations of Mr. Justice Miller in regard to the act of 1867 apply fully to the act of 1875.

In McGinnity *vs.* White, 3 Dillon, 350, the plaintiff in February, 1870, brought a suit in a State court of Nebraska against five defendants. One of them, White, after answering, in

84 April, 1873, filed a petition for the removal of the suit into the circuit court of the United States for the district of Nebraska, under the act of July 27, 1866, (14 U. S. Stat. at Large, 306.) The petition set forth that White "is now and since the 19th day of February, 1873, has been a citizen of the State of New Jersey," and that "the plaintiff is and was at the time of bringing the suit a citizen of Nebraska," and contained the other necessary averments. The State court made an order removing the cause. A motion was made before the circuit court, held by Judges Dillon and Dundy, to remand the cause to the State court. The opinion of the court was delivered by Judge Dillon. He cites the case of Johnson *vs.* Monell as having determined that, under the act of 1867, "a party to a suit who, while it is pending, becomes a *bona fide* citizen of another State, is entitled, if the other required conditions are met, to have the case remanded."

85 He adds: "As both acts give the right to apply for the removal at any time before the trial or final hearing of the cause, I can see no difference in this respect between the act of

1866 and the act of 1867; and the reasoning in the case cited seems to be applicable here, and to favor the right of removal. Pending the suit in the State court the defendant has in good faith become a non-resident of the State of Nebraska and a citizen of another State, and it is this which constitutes the substantial ground upon which the right under the act of 1866 to the removal is based." The motion to remand was denied. (See also Yulee *vs.* Vose, 19 Albany Law Journal, 299.)

On the facts set forth in the petition in this case, this suit was, and is one properly removable into this court, under the act of 1875.

As to the non-filing of the record by the 7th of April, the 3d section of the act of 1875 provides, that when the proper petition and bond, in a proper suit, are presented to the State
86 court, it shall be the duty of the court to accept them and proceed no further in the suit. It then goes on to provide, that, "the said copy," that is, a copy of the record in the State court, in the suit "being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in said circuit court." The words "as aforesaid" are found in the same connection as § 12 of the act of 1879, and in § 5 of the act of March 3, 1863, (12 U. S. Stat. at Large, 757,) and in the act of 1866, and in the act of 1867, and in § 2 of the act of July 27, 1868, (15 Id., 227,) and in § 639 of the Revised Statutes. They cannot properly have any other meaning than that when the copy is entered by the party removing the cause, it must be entered at the time mentioned before as the time to be named in the bond, namely, the first day of the then next session of the
87 circuit court. It is true that there are exceptional cases provided for in § 7 of the act of 1875, in which it is declared that the bond may be satisfied and discharged by the filing of the copy of the record by the party removing the cause after the day named in the bond. But the present case is not one of such exceptional cases. The term of this court to which this suit was removable commenced more than twenty days after the petition and bond were filed in the State court, and it does not appear that the clerk of the State court refused to furnish a copy of the record. On the contrary, the certified copy of the record filed in this court was certified by such clerk on the 18th of March, 1879. The two cases in this court of Broadnax *vs.* Eisner, (13 Blatchf. C. C. R., 366,) and Bright *vs.* Milwaukee R. R. Co., (14 Id., 214,) are authorities to show that the defendant has lost its right to perfect the removal of this cause, and that this
88 cause must be remanded. The plaintiff has not waived the delay in filing the copy, nor does the allegation in the affidavit of the defendant's attorney that by inadvertence, the

copy was not filed on the first day of the term furnish a sufficient excuse to authorize this court to say that it acquired jurisdiction of the cause by the filing of the copy on the 10th of April. The case last cited is authority, also, for holding that there is nothing in § 5 of the act of 1875 which prevents this court from remanding this cause. The case of Osgood *vs.* Chicago R. R. Co., (6 Bissell, 330,) was, on the facts involved in the decision of it, not like the present case. The copy of the record of the State court had, in that case been filed in the circuit court in time by the party removing the cause, and the cause had in all respects been "removed" to the circuit court within the language of § 5.

89 The present case has not been "removed" to this court because that has not been done which under sec. 3 of the act authorizes this court to proceed in the suit. In regard to what is said in the case in 6 Bissell, respecting the authority of the circuit court, since sec. 5 of the act of 1875 was enacted, to dismiss and remand causes, it may be observed that the provisions of it are enabling and not prohibitory, and that they are such as not to indicate any intention in Congress to take away from the circuit court the power of remanding a cause to the State court, on the ground that the prescribed prerequisites necessary to authorize the circuit court to proceed in the cause, have not been complied with.

The motion to remand this cause to the State court is granted, with costs to be taxed.

D. M. PORTER,
For the Plaintiff.
C. W. BANGS,
For the Defendant.

90 (Endorsed:) Circuit court of the United States for the southern district of New York. Samuel McLean *vs.* The St. Paul and Chicago Railway Company. Copy. Decision, May 14th, 1879. Blatchford, J. Original filed May 14th, 1879.

91 At a stated term of the circuit court of the United States for the southern district of New York, held at the court room thereof, in the new post office building, in the city and State of New York, on the 24th day of May, 1879.

Present: Hon. Samuel Blatchford, Judge.

SAMUEL MCLEAN, Plaintiff,
vs.
THE ST. PAUL AND CHICAGO RAILWAY COMPANY, Defendant.

Upon reading and filing the pleadings and certified copies of the return bond and order, and the notice of motion and the affidavits of D. M. Porter and C. W. Bangs, and after hearing Mr.

D. M. Porter, of counsel for the plaintiff, for the motion
92 to remand this cause to the court of common pleas in and for the city and county of New York, and Mr. C. W. Bangs, of counsel for the defendant, opposed.

It is ordered, that the plaintiff's motion to remand this cause to the State court, to wit, the court of common pleas in and for the city and county of New York, be and the same is hereby granted, and the said cause is hereby remanded to the said last-named court with $10.00 costs and $2.05 disbursements, amounting in the aggregate to $12.05, to be paid by the defendant to the plaintiff.

SAMUEL BLATCHFORD.

(Endorsed:) U. S. circuit court. Samuel McLean, plaintiff, *agt.* The St. Paul and Chicago Railway Company. Copy proposed order remanding cause to the court of common pleas. D. M. Porter, pl'ff's attorney.

93 DREXEL BUILDING, WALL ST., COR. BROAD, NEW YORK.

SIR: Please take notice that an order of which the within is a copy, will be presented to the Hon. Samuel Blatchford, one of the judges of the U. S. circuit court, at the court room thereof, new post office building, in the city of New York, for settlement on Friday, May 23, 1879, at 11 A. M.

Yours, &c., D. M. PORTER,
Plaintiff's Attorney.

To C. W. BANGS, ESQ.,
Defendant's Atty.

Due service of a copy of the within order and notice is hereby admitted.

May 19, 1879. C. W. BANGS,
Defendant's Attorney.

U. S. circuit court. Filed May 24, 1879.
JOHN I. DAVENPORT, *Clerk.*

94 Court of Common Pleas for the city and county of New York.

SAMUEL MCLEAN, Plaintiff,
against
THE ST. PAUL AND CHICAGO RAILWAY COMPANY, Defendant.

The plaintiff, for his complaint in the above-entitled action, and for a first cause of action, avers upon information and belief that the St. Paul and Pacific Railroad Company in the State of Minnesota was during the entire year one thousand eight hundred and sixty-five, a corporation created by and existing under and pursuant to the laws of the State of Minnesota, and that on or

about the 4th day of August, 1865, the said St. Paul and Pacific Railroad Company made and entered into a contract, duly signed and sealed with the corporate seal of said company, and executed through its president and attorney-in-fact, with Henry Thornton and J. G. T. Child, who executed the same for themselves and their associate contractors, to wit, William Pickstone, Henry Mann, and John B. Stephenson, under the name of Henry
95 Thornton, J. G. T. Child, and their associates, of the city of Manchester, England, in and by which, among other things, said Henry Thornton, William Pickstone, Henry Mann, John B. Stephenson, and John G. T. Child were to grade the defendant's railroad from Winona to St. Paul, in the State of Minnesota, or to furnish the money therefor.

Plaintiff further says, upon information and belief, that thereafter, to wit, between the date of said contract and the 31st day of December, 1867, the said Thornton, Pickstone, Mann, Stephenson, and Child, did perform work for and did furnish money to the defendant of the price and to the amount of fourteen thousand eight hundred and seventy pounds six shillings and three pence (£14,870 6s. 3d.) sterling, on which the current rate of exchange on London, England, was to be paid, which exchange so to be paid made the said sum equal to one hundred and five thousand dollars ($105,000) currency; and it was provided in and by said contract that if the said Thornton, Pickstone, Mann, Stephenson, and Child should, from any cause, be unable to comply with the provisions of the agreement with reference to the construction of the said railroad from Winona to St. Paul, that then the St. Paul and Pacific Railroad Company, now the St. Paul and Chi-
96 cago Railway Company, as hereinafter stated, was to repay the said Thornton, Pickstone, Mann, Stephenson, and Child for all work that might be done or advances that might be made by them on account of the performance of said contract, and which work and labor and moneys advanced, of the price and to the amount aforesaid, were done and furnished in performance of said contract.

Plaintiff further says, upon information and belief, that after the said contract was made the name of the St. Paul and Pacific Railroad Company was duly changed to the St. Paul and Chicago Railway Company, the defendant herein, and which continues to be and is such corporation.

Plaintiff further says, upon information and belief, that thereafter, to wit, on or about the 9th day of June, 1868, the defendant and the said Thornton, Pickstone, Mann, Stephenson, and Child stated an account between each of them, and that there was found to be due and owing to the said Thornton, Pickstone, Mann, Stephenson, and Child, from the defendant, the said sum of fourteen thousand eight hundred and seventy pounds six shill-

ings and three pence (£14,870 6s. 3d.) sterling, with interest
97 thereon at the rate of seven per cent. per annum from the 31st day of December, 1867, being with the current exchange on London, England, equivalent to the sum of one hundred and five thousand ($105,000) currency, with interest thereon from the 31st day of December, 1867, which account was stated between said last-named parties at such sum due from the defendant to the other parties to said contract.

Plaintiff further avers, upon information and belief, that on or about the 10th day of January, 1876, the said John B. Stephenson at the city of New York departed this life, leaving a last will and testament, and leaving Elizabeth F. Stephenson his executrix and sole legatee; that thereafter the said will was admitted to probate in the office of the surrogate of the city and county of New York, in the State of New York, where the said John B. Stephenson was a resident at the time of his decease, and letters testamentary were duly issued by the said surrogate to the said Elizabeth F. Stephenson as sole executrix of the last will and testament of John B. Stephenson, deceased, and she qualified as such, and continues to be such executrix.

Plaintiff further avers, upon information and belief, that
98 on the said 9th day of June, 1868, the said John B. Stephenson was a resident of the city, county and State of New York, and that he was such resident at the time of his decease, and that the said Elizabeth F. Stephenson, his executrix, was at his decease and still is a resident of the city of New York, and that the plaintiff is a resident of the city of Brooklyn, county of Kings, and State of New York.

Plaintiff further says that thereafter, at the city of New York, on or about the 28th day of January, 1879, the owners and holders of said cause of action duly assigned, sold, transferred, and set over said cause of action to the plaintiff herein, and the plaintiff now owns and holds the same, and plaintiff states, upon information and belief, that no part of said sum of $105,000, with interest thereon from the 31st day of December, 1867, has been paid, but the same remains due and owing to the plaintiff from the defendant.

The plaintiff, for a second cause of action, adopts all the allegations contained in the first cause of action, and makes the same a part of this cause of action, and avers, upon information and belief, that on or about the 9th day of June, 1868,
99 the defendant, under its corporal name and seal, made and entered into an agreement with the said Henry Thornton, William Pickstone, Henry Mann, John B. Stephenson, and John G. T. Child, under the name of J. G. T. Child, as follows, to wit:

This agreement, made by and between The Saint Paul & Chi-

cago Railway Company, a corporation existing under the laws of the State of Minnesota, of the first part, and J. G. T. Child, of Manchester, England, of the second part, witnesseth:

Whereas on the 4th of August, 1865, at Manchester, aforesaid, Henry Thornton and the said party of the second part, entered into an agreement, in writing, with the St. Paul and Pacific Railroad Company, among other things, to furnish certain sums of money to aid in the construction of that part of the railroad of said company, extending from St. Paul to Winona, in said State, which said sums were accordingly furnished, and which, together with the interest thereon, and sundry sums expended by them in the interest of said company, it is agreed amount to the sum of fourteen thousand eight hundred and seventy pounds six shillings and three pence, sterling, with interest, at seven per cent., from the 31st of December, 1867; and—

[U. S. five-cent. internal rev. stamp, cancelled.]

100 "Whereas, the said party of the first part, the St. Paul and Chicago Railway Company, is the successor in fact and in name of all the rights and liabilities of the said St. Paul and Pacific Railroad Company relating to the railway between St. Paul, Winona, and the Iowa State line:

Now, therefore, in consideration of the premises, and of the discharge of all liability of the party of the first part hereto and of the said St. Paul and Pacific Railroad Company upon the said agreement of the 4th of August, 1865, which discharge has been duly executed by the said Child in person, and by the said Thornton by John B. Stephenson, his attorney in fact, the said party of the first part hereby agrees to deliver to the said Child their first mortgage seven per cent. land grant sinking fund bonds to the amount of one hundred and forty thousand dollars par value; and—

"Whereas, the said parties hereto, together with John B. Stephenson aforesaid, of Boston, Massachusetts, have entered into another agreement, bearing even date herewith, whereby the said Child and the said Stephenson have agreed, for a valuable consideration, to furnish the party of the first part, at the city of New York, not exceeding eighteen hundred and fifty tons

101 nor less than fifteen hundred tons of iron rails to be laid upon their railway, upon a credit of six months, and to be renewed if required for a further six and twelve months, making together eighteen months.

"Now, therefore, it is further agreed by the party of the second part, that the party of the first part have the right at any time, on or before the maturity of their acceptances as aforesaid for the purchase-money as aforesaid, upon the payment in sterling exchange equivalent to seventy-five cents to the dollar of the lawful

money of the United States of the par value of said bonds, to require a return of said bonds, and he, the said Child, hereby binds himself thereupon to return the same.

"And in consideration of the premises it is further mutually agreed that if the said Child and Stephenson, the parties of the second part to the agreement hereinbefore referred to, shall fail to furnish the rails and deliver the same in New York as aforesaid, then and in that case no title to the one hundred and forty thousand dollars of bonds is to pass to the said Child, and
102 the same are to be returned by him to the said party of the first part, and the claim of the said Henry Thornton and the said Child is to remain at fourteen thousand eight hundred and seventy pounds six shillings and three pence, with interest at 7 per cent. from the 31st of December, 1867, as an ordinary claim for money furnished against the party of the first part.

"And it is further agreed that the party of the first part in consideration of the premises will also deliver and pay over to said Child fourteen hundred shares of one hundred dollars each of the capital stock of the party of the first part, so soon as the same shall be discharged of the lien of the trust held by the Hon. William B. Ogden, of the city of New York.

"In witness whereof the party of the first part has caused the name of its president to be subscribed hereto and its corporate seal to be affixed, and the party of the second part has also subscribed his name and affixed his seal.

[U. S. five-cent internal rev. stamp cancelled.]

"Done at St. Paul the 9th day of June, 1868.

[Seal of the St. Paul & Chicago Railway Co.]

"EDMOND RICE,
"*President of the St. Paul & Chicago Railway Company.*

Duplicate.

"J. G. T. CHILD." [SEAL.]

103 That as the plaintiff is informed and believes at the same time and simultaneously therewith, and as a part of the same transaction, the said defendant, under its corporate name and seal, made and entered into another agreement with the said Henry Thornton, William Pickstone, Henry Mann, John B. Stephenson, and John G. T. Child, under the name of J. G. T. Child and John B. Stephenson, as follows, to wit:

"This agreement, made by and between the St. Paul and Chicago Railway Company, a corporation existing under the laws of the State of Minnesota, of the first part, and J. G. T. Child, of Manchester, England, and John B. Stephenson, of Boston, Massachusetts, of the second part, witnesseth:

"That for a valuable consideration to them in hand, paid the

[U. S. five-cent internal rev. stamp cancelled.] parties of the second part hereby agree to purchase for the party of the first part, and cause to be delivered in the city of New York on or before the first day of October next, a quantity of iron rails, not exceeding eighteen hundred and fifty nor less than fifteen hundred tons, of not more than fifty-six pounds nor less than fifty-five pounds weight to the lineal yard, at the market rates, upon a credit of six months, to be renewed if desired at six and twelve months, making
104 together eighteen months; and for the payment of the purchase money thereof the party of the first part agree to give their acceptances as aforesaid, payable at the office of the Farmer's Loan and Trust Company, in the city of New York, with interest at the rate of seven per cent. sterling, and at the maturity thereof to renew the same as aforesaid, (in case they shall desire a renewal,) and thereupon to place as collateral thereto their first mortgage 7 per cent. land grant sinking fund bonds at the rate of seventy-five cents to the dollar, upon condition that if the rails, although delivered in New York on or before the first day of October next, cannot with ordinary diligence be transported to St. Paul in time to be laid between St. Paul and Hastings upon the railway before the maturity of the acceptance, then the renewal as aforesaid to be made and the delivery of the bonds as collateral to be deferred until the rails can be laid.

"It is understood that the vendors of the rails are to retain a lien thereon for the purchase money until the means have been provided by the party of the first part to complete the grading of the road-bed between St. Paul and Hastings; and, further, that the party of the first part reserve the option of paying their acceptances in advance of maturity, paying interest only for the credit used.

105 Done at St. Paul, June 9th, 1868.

In witness whereof the party of the first part has caused the name of its president to be hereunto subscribed and its corporate seal to be affixed, and the parties of the second part have also subscribed their names and affixed their seals.

[Seal of the St. Paul & Chicago Railway Co.] "EDMUND RICE,
"*President of the St. Paul & Chicago*
"*Railway Company.*

Duplicate. "J. G. T. CHILD. [SEAL.]
"JOHN B. STEPHENSON. [SEAL.]

Plaintiff further avers upon information and belief that neither the said Thornton, Pickstone, Mann, Stephenson and Child, nor any of them, delivered the rails mentioned in the said contracts, or any part thereof, but such non-delivery of said rails was with the assent and at the request of the defendant; and said bonds

were never delivered to them, nor to any of them, by the said St. Paul and Chicago Railway Company, the defendant herein; and that the original sum agreed to be paid as aforesaid, to wit, the sum of one hundred and five thousand dollars, with interest thereon from the 31st day of December, 1867, became due and payable to the said Thornton, Pickstone, Mann, Stephenson and Child.

106 Plaintiff further avers that on or about the 28th day of January, 1879, at the city of New York, the owners and holders of said cause of action duly assigned, sold, transferred, and set over this cause of action to the plaintiff herein, who now owns and holds the same; and the plaintiff states upon information and belief that no part of the sum of $105,000, with interest thereon from the 31st day of December, 1867, has been paid, but the same remains due and owing to the plaintiff from the defendant as aforesaid.

Wherefore, the plaintiff demands judgment against the defendant for the sum of one hundred and five thousand dollars, ($105,000,) with interest thereon from the 31st day of December, 1867, besides costs and disbursements in this action.

D. M. PORTER,
Plaintiffs' Attorney.

Office and Post Office address:
No. 3 Broad street, New York city.

107 CITY AND COUNTY OF NEW YORK, *ss:*

Samuel McLean, being duly sworn, deposes and says that he is the plaintiff in the above entitled action, and that the foregoing complaint is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

SAM. McLEAN.

Sworn to before me this 1st day of February, 1879.
JOHN S. SMITH,
Notary Public, N. Y. Co.

108 N. Y. common pleas. Samuel McLean, plaintiff, against The St. Paul and Chicago Railway Company, defendant. Copy. Summons and complaint. D. M. Porter, att'y for pltff., Dresel Building.

109 N. Y. Common Pleas.

SAMUEL McLEAN
agt.
THE ST. PAUL & CHICAGO RAILWAY COMPANY.

The answer of the defendant in this action to the complaint of the plaintiff therein:

First. To the first cause of action stated in the complaint, the

defendant answering admits that the St. Paul & Pacific Railroad Company was, during the entire year 1865 a corporation created by and existing under the laws of the State of Minnesota, and that on or about August 4th, 1865, the said company, under its corporate name, made and entered into a contract with Henry Thornton and J. G. T. Child, who executed the same for themselves and their associate contractors, viz: William Pickstone, Henry Mann and John B. Stephenson, under the name of Henry Thornton, J. G. T. Child and associates, of Manchester, England, of which contract a copy is hereto annexed marked "A"; but defendant denies that it entered into or executed with said Thornton, Child, Pickstone, Mann & Stephenson, or any or
110 either of them, any other contract.

And the defendant admits that after said contract, of which a copy is hereto annexed, was made and entered into, but denies that after any other contract was made and entered into with said parties the name of the St. Paul & Pacific Railroad Company was duly changed to the St. Paul & Chicago Railway Company, which continues to be and is such corporation.

The defendant, while denying upon information and belief, that the only thing which the said contract provided, among other things, was that said Henry Thornton, J. G. T. Child and associates were to grade defendant's railroad from Winona to St. Paul, or to furnish the money therefor; admits and upon information and belief alleges that, among other things, the said Thornton, Child and associates were to locate, construct, equip and run a first-class railroad between the points named.

The defendant denies, upon information and belief, that thereafter, between the date of said contract and December 31st, 1867, or at any other time, the said Thornton, Child, and associates performed work for and furnished money to the defend-
111 ant of the price and to the amount of fourteen thousand eight hundred and seventy pounds six shillings and three pence, sterling, (£14,870 6 3,) or that on such alleged or any other amount the current rate of exchange on London, England, was to be paid, making the said sum equal to $105,000, currency; and upon information and belief the defendant alleges that said contractors last named wholly failed, neglected, and omitted to perform the said contract according to the true intent and meaning and according to the terms thereof.

And this defendant, while admitting that it was agreed that if said Thornton, Child, Pickstone, Mann, and Stephenson should be unable from any cause to comply with the terms of the said agreement with reference to the construction of the railroad from Winona to St. Paul, the St. Paul & Pacific Railroad Co. was to repay all advances made on account of such performance; upon information and belief, denies that work was performed or mon-

eys advanced, under or pursuant to said contract, of the price and to the amount alleged in the complaint, or to any other amount.

112 The defendant, upon information and belief, denies that on or about June 9th, 1868, there was an account stated between said Thornton, Child, their associates and this defendant; or that there was then or at any other time found to be due by the defendant to said Thornton and his associates the sum of fourteen thousand eight hundred and seventy pounds, six shillings and three pence sterling, (£14,870 6 3,) with interest at the rate of seven per cent. per annum, from December 31st, 1867, equivalent at the current rate of exchange to the sum of one hundred and five thousand dollars, ($105,000,) with interest at seven per cent. per annum from December 31st, 1867, or any other sum at any other rate of interest from any other time whatever.

Defendant admits, upon information and belief, that said John B. Stephenson died on or about the 10th day of January, 1876, but denies any knowledge or information sufficient to form a belief whether or not said Stephenson left a last will and testament, and whether or not Elizabeth F. Stephenson was left as his executrix and sole legatee; and defendant denies any knowledge or information sufficient to form a belief as to the admission of said

113 will to probate and the issue of letters testamentary to said Elizabeth F. Stephenson as sole executrix of said last will and testament.

Defendant denies any knowledge or information sufficient to form a belief as to the plaintiff's place of residence or as to the assignment, sale and transfer to him of said first cause of action by the holders and owners thereof alleged in the complaint to have been made.

This defendant admits that no part of said sum of one hundred and five thousand dollars, ($105,000,) with interest thereon, from December 31st, 1867, has been paid, but denies that the same remains due and owing to the plaintiff by the defendant.

To the second cause of action stated in the complaint, the defendant answering denies, upon information and belief, that on or about June 9th, 1868, the St. Paul and Chicago Railway Company made and entered into either of the further alleged contracts, copies of which are set forth in the complaint, with said Thornton, Child, Pickstone, Mann, and Stephenson; but alleges, upon information and belief, that said contracts were not executed by the said railway company, nor by the authority thereof, and

114 the same were and are not the acts and deeds, and that neither of them was or is the act or deed of said company.

The defendant admits that said Thornton, Child, and their associates did not deliver any iron rails, as required by said pretended contracts, but denies, upon information and

belief, that the performance of said contracts was waived by this defendant; and defendant admits that no bonds were delivered, as required by such alleged contracts to the parties last named, by this defendant; but the defendant denies that the original sum of one hundred and five thousand dollars, ($105,000,) with interest, from December 31st, 1867, mentioned in said alleged agreements, upon the failure thereof, became due and payable to the said Thornton, Child, and associates, by this defendant.

Defendant denies any knowledge or information sufficient to form a belief as to the assignment, sale, and transfer to the plaintiff of the said second alleged cause of action by the owners and holders thereof, which is alleged in the complaint to have been made.

Defendant admits that no part of the sum of $105,000, with interest, from December 31st, 1867, has been paid, but denies
115 that the same remains due and owing by the defendant to the plaintiff.

Second. For a further and separate defence to the causes of action set forth in the complaint, the defendant says, upon information and belief, that on or about June 9th, 1868, by a mutual agreement by and between the St. Paul and Chicago Railway Company and the said Thornton, Child, and associates, the contract first alleged in the complaint was rescinded, so far as to relieve and release the defendant from any further obligation to perform or comply with the same without releasing or discharging the claim which the said St. Paul and Pacific Railroad Company or the St. Paul and Chicago Railway Company then had against said Henry Thornton, J. G. T. Child, and their associates, for or by reason of the non-performance of the said contract of August 4th, 1865, by the last-named parties.

C. W. BANGS,
Defendant's Attorney.

CITY AND COUNTY OF NEW YORK, *ss:*

James M. McKinley, being duly sworn deposes and says that he is the president of the St. Paul and Chicago Railway Company, the defendant in this action; and that the foregoing answer is true, to his own knowledge, except as to the matters
116 therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JAMES M. McKINLAY.

Sworn to before me, this 27th day of February, 1879.

WM. S. BAINTON,
(139) *Notary Public, N. Y. Co.*

117 "A."

"This agreement, made this fourth day of August, in the year one thousand eight hundred and sixty-five, (1865,) by and between the Saint Paul and Pacific Railroad Company, of the State of Minnesota, and the United States of America, of the first part, by Edmund Rice, their president and attorney in fact, and Henry Thornton, J. G. T. Child, and their associates, of the city of Manchester, England, of the second part: Witnesseth, whereas by an act of the Legislature of the Territory of Minnesota, approved on the 22d day of May, A. D. 1857, the Minnesota and Pacific Railroad Company was incorporated with full power to locate, construct, and operate a railroad from Winona, in said Territory, up the valley of the Mississippi river to Saint Paul, in said Territory, known as the Branch Railroad, from Winona to Saint Paul, and whereas by an act of the Legislature of the State of Minnesota, approved on the 10th day of March, A. D. 1862, the name of the said company was changed to the Saint Paul and Pacific
118 Railroad Company, and all the rights, privileges, franchises, lands, property, and interest granted by said Territory to the said Minnesota and Pacific Railroad Company were continued and granted to and vested in the said Saint Paul and Pacific Railroad Company; and whereas, by an act of the legislature aforesaid, approved on the 6th day of March, A. D. 1863, the said State of Minnesota did grant to the said Saint Paul and Pacific Railroad Company a quantity of lands belonging to said State and in said act described, amounting to about nine hundred thousand acres, to aid in the construction of said railroad from Winona to Saint Paul aforesaid; and whereas, by an act of the legislature aforesaid, approved on the 6th day of February, A. D. 1864, entitled 'An act to amend the charter of the Saint Paul and Pacific Railroad Company,' the said railroad company were authorized to create and issue in such manner and on such terms as it might deem expedient one or more classes of preferred stock and special stock, and to make such agreement as it might deem proper with the respective holders thereof as to the dividends thereon, and the securities for such dividends, and for the appropriation of the net earnings of any portion of the railroad which it might construct or might acquire to the payment of dividends on such special stock, and for the administration of the portion of said railroad and the land grant appertaining thereto, to which said special stock might pertain, and for the separate organization of the holders of such special stock for the purpose of that administration, enabling them, or directors chosen by them, to exercise in respect to the portion of the railroad to which such stock shall pertain all the powers of the company; and whereas, for the purpose of constructing the said Branch Railroad from Winona to Saint Paul, the said Saint Paul and

Pacific Railroad Company have, under the authority upon them conferred by the act above referred to, authorized and empowered said Edmund Rice, president and attorney of said
119 railroad as aforesaid, to issue thirty thousand shares of special stock of said company applicable and relative solely to said Branch Railroad certificates, of which stock the said president and attorney hath duly assigned and delivered to the said parties of the second part hereto: Now, therefore, in consideration of the premises, and of the covenants and conditions hereinafter contained on the part of the said parties of the second part to be performed, and of the sum of one dollar to it in hand paid, the said party of the first part does hereby covenant, promise, and agree to and with the parties of the second part as follows, that is to say:

First. That it, the said party of the first part, will never issue or permit to be issued in any manner any stock or certificate of stock, whether special, preferred or common, in any manner pertaining to or in anywise affecting the said Branch Railroad from Winona to Saint Paul other than those above described and set forth, the said party of the first part admitting hereby that all powers in that behalf conferred by said act are exhausted by the aforesaid issue.

Second. That it, the said party of the first part, will not convey by any deed or instrument of any kind whatsoever, or by any deed, instrument or act of any kind whatsoever, encumber in any manner the said Branch Railroad, or any right, privilege, franchise or power it may have over the same or any part thereof, and that in any future deed or mortgage or other instrument it may execute upon the general property or franchises of its road, the said Branch Railroad shall be especially excepted in fact and by name.

Third. That the holders and owners of the said special preferred stock, so issued as above set forth, shall have the exclusive right of administration and management of the said Branch Railroad from said Winona to Saint Paul; that all the power and authority possessed by the party of the first part, whether
120 for the location, construction and equipment or use of the said railroad, is by these presents irrevocably conferred upon the holders and owners of such special stock, hereby giving to such owners and holders full power and authority to elect a board of directors and such other officers and agents as they may desire for the proper execution and exercise of the powers hereby conferred.

Fourth. That all the earnings of said Branch Railroad may be collected and received by the holders and owners of such special stock in such manner as they may prescribe and determine, and that the same may be applied to the payment of dividends on such special stock, or otherwise used, expended or appropriated

in such manner as they the said stockholders may determine, without any liability for the same or any part thereof to the party of the first part, their successors or assigns.

Fifth. That the owners and holders of such special stock shall have exclusive management and control of all the lands granted by said State of Minnesota to said parties of the first part to aid in the construction of said Branch Railroad hereinbefore referred to, and full power and authority is hereby irrevocably conferred upon such owners and holders, their agents and attorneys, to enter upon and occupy the same, to procure title thereto in the manner prescribed in the said act, to bargain, sell and convey the same, either in the name of said party of the first part or otherwise, for such sum or sums of money or other consideration as to the said holders and owners of such stock may seem fit, without accounting to the party of the first part for any portion of the proceeds thereof, and without any liability therefor to any person whatsoever. The said party of the first part hereby relinquishing irrevocably to the owners and holders of such special stock all the powers and rights over the said lands, and the proceeds
121 thereof when sold that are now possessed by it or may be hereafter in any manner acquired.

Sixth. That in all elections for directors of said Branch Railroad, and in all other matters relating to the construction, management and use thereof, no stock or bondholder of the party of the first part shall have any right to vote by virtue of any stock or bonds he may own in the company of said party of the first part, and no owner or holder of any such special stock, or of any stock or bond hereafter issued by them, shall have any right to vote at any election of directors of the said party of the first part, or have any voice whatever in its management or use by virtue of any such special stock or bonds.

Seventh. That whenever hereafter in the location, construction or use of said Branch Railroad it should be necessary to use either the corporate name of the party of the first part, or to have upon any written instrument the signature of any of its officers, or to use the corporate seal thereof, the same may be used or shall be affixed upon the demand of the president, secretary or other proper officer or agent of such special stockholders or owners.

Eighth. That the said party of the first part shall do all proper things and use all proper influences to secure the proper and needed legislation in the State of Minnesota, to the satisfaction of the said owners and holders of such special stock, to enable them to construct, maintain and use the said Branch Railroad; and any and all grants, privileges or rights hereafter conferred upon the party of the first part, either by the Congress of the United States or by the Legislature of Minnesota, pertaining to

said Branch Railroad, shall enure to the benefit of the said owners and holders the same as if such grant had been made directly to them.

Ninth. That any and all further contracts, agreements,
122 or acts required by the said owners and holders to be hereafter executed or performed by the said party of the first part to carry this agreement into effect, shall be fully executed upon reasonable and proper demand.

Tenth. That the owners and holders of such special stock, or the directors chosen by them, are hereby fully authorized and empowered to create or re-issue such amounts of capital stock, special or preferred, not exceeding in the aggregate three (3) millions of dollars of the said Branch Railroad as they may deem necessary or expedient, which stock shall be separate and distinct from any other capital stock of the party of the first part, and the owners and holders thereof shall have full power and authority to make, execute, issue and deliver bonds and obligations in any amount which said owners or holders may deem necessary or expedient to prescribe, the sum or sums for which each of said bonds shall be issued, the time and place where and when and person or persons to whom the principal and interest shall be payable, and the rate of interest which said bonds may bear. And to secure the payment of all or any of said bonds, all powers and authority conferred by the party of the first part, or by the laws of the State of Minnesota, to make, execute and deliver mortgages and deeds of trust upon any of the corporate franchises and property of the said Branch Railroad, are hereby conferred upon the said owners and holders of such special stock. That all certificates of stock and all other instruments in writing binding or in anywise affecting the said Branch Railroad, its franchises or property, shall be executed by such officers as the said special stockholders may direct, and the same right and authority to use the corporate seal of the party of the first part upon all instruments in writing relating or pertaining to said Branch Railroad is hereby conferred upon the said owners and holders of special stock as is possessed by the party of the
123 first part, and a copy of the die and stamp of said seal shall be furnished to said owners and holders for their own exclusive use. The said owners and holders of such special stock are hereby authorized and empowered to permit any holder of any such stock, bond or bonds to vote at any meetings held for the election of directors of said Branch Railroad, or for any other purpose, in such manner as the said owners and holders may determine.

Eleventh. That the said owners and holders of such special stock shall have such portion of the depot grounds of the said party of the first part at the city of St. Paul (estimated at forty (40) acres

of land) as may be necessary for the proper management of the business of such Branch Railroad at that place, provided that the business interests of the party of the first part shall not be materially injured thereby, paying for all such lands as they may use, and as shall be actually conveyed to them the actual cost thereof to the party of the first part, not exceeding two hundred (200) dollars per acre, provided that so much of the island in the Mississippi river now occupied by the said party of the first part (which is hereby declared to contain 2 $\frac{78}{100}$ acres of land) for depot grounds and other purposes, as shall be conveyed to the said owners and holders, shall be paid for at such rate as may be agreed upon between the parties, not exceeding $25,000 per acre, all of said lands to be paid for in the first mortgage of the said Branch Railroad Company, or in such other manner as may be mutually agreed upon.

Twelfth. That in the construction of this agreement the owners and holders of any capital stock or bonds (if the owner of any such bonds are permitted to vote) that may hereafter be issued under the tenth paragraph hereof, shall be considered and held to be owners and holders of the special or preferred stock issued by the party of the first part as hereinbefore set forth.

124 *Thirteenth.* That the said party of the first part by these presents does hereby relinquish forever to the owners and holders of such special stock, to be exclusively used and exercised by them, in such manner and by such officers or agents as they may elect, so much of all their corporate rights, powers, privileges and franchises as pertain to that portion of their railroad extending from Winona to St. Paul aforesaid, hereby conferring upon them the right to exercise and use all the corporate rights, powers, privileges and franchises that are possessed by the party of the first part, so far as the same may affect the said branch railroad aforesaid.

And the said parties of the second part, in consideration of the the foregoing covenants and agreements on the part of the said party of the first part, to be performed, and of one dollar to them in hand paid, do hereby covenant and agree to and with the said party of the first part, as follows, that is to say:

First. That they will locate, construct and equip in the most economical manner, and run a first-class railroad, in all respects as required by the charter of the party of the first part, from Winona to St. Paul aforesaid, within the time that is now required by the charter of the said party of the first part, or by any other law of the State of Minnesota, (provided that the time now fixed by law shall not be lessened by any subsequent legislation of said State.) That they will commence the construction of such branch railroad at the city of St. Paul and proceed immediately, or as soon as practicable, from thence by the way of the town of Has-

tings, in said State, completing the first twenty miles of said branch railroad from St. Paul before the iron track thereof shall be laid below the said town of Hastings. It being distinctly understood and agreed that they will expend upon the grading of said branch railroad the sum of ten thousand pounds sterling during the present year, so that ten continuous miles
125 thereof shall be graded ready for the superstructure, in compliance with the existing law of the State of Minnesota.

Second. It is also mutually covenanted and agreed by and between the parties hereto as follows, that is to say: That the parties of the second part will immediately proceed to elect a board of directors, who shall organize and elect proper officers of their board, and that there shall be by them also created and issued certificates for thirty thousand shares of capital stock in lieu of that assigned and delivered to the parties of the second part as aforesaid, which may be surrendered to said directors for cancellation; that ten thousand shares of said capital stock shall be set apart and allotted by said board of directors to the said parties of the second part, and that ten thousand shares shall be set apart and allotted for the specific disposal of the parties of the second part for the sole purpose of better enabling them to secure the construction of said branch railroad, and that the remaining ten thousand shares shall be allotted and delivered to Edmund Rice, president and attorney as aforesaid, for the use of said party of the first part: and that if any surplus shall remain of the ten thousand shares set apart as above to aid in the construction of said branch railroad after the construction of the same, it shall be distributed equally between the said parties of the second part and the said Edmund Rice, president and attorney as aforesaid.

Third. That said board of directors shall also proceed to execute and deliver a mortgage or deed of trust whereby said branch railroad and all the lands appertaining thereto and granted, or which may be granted, to aid in the construction thereof by the said State of Minnesota as aforesaid, and all the rights, property and effects appertaining to said branch railroad shall be con-
126 veyed in trust to one or more trustees to secure the payment of bonds which shall be issued in accordance with such terms as may be prescribed in such mortgage or deed of trust, and which bonds shall be in an amount sufficient in the aggregate to enable the parties of the second part, with the proceeds of the sale thereof, to construct and equip said branch railroad, it being the intention of the parties hereto that said branch railroad shall be built and equipped exclusively by the proceeds of the sale of the said bonds, and that no calls shall be made or assessments levied upon the shares representing said branch railroad, unless by reason of the impracticability of selling said bonds

it shall become positively necessary to make such calls to enable said parties of the second part or the holders and owners of such shares to complete said branch railroad, and in the event of such call or assessment such holders and owners by responding thereto shall be entitled to have and receive such bonds in an amount equal at least to the call or assessment so paid.

Fourth. It is further agreed that said shares in no event shall be assignable on the books of said board of directors until said branch railroad shall have been constructed and put into operation.

Fifth. It is further agreed that said bonds, when created as above set forth, shall all be subject to the disposal of the parties of the second part at the best market price, and that after repaying themselves for the advances made or to be made all the proceeds of the sales of such bonds shall be held, deposited, used and paid out only for the construction and equipment of said branch railroad, and only upon estimates and vouchers therefor duly authenticated and audited. Salaries, commissions, printing, payment of trustee or trustees, interest and the incidental expenses connected with the organization of the board of directors and the execution of the trust imposed upon them to be in-
127 cluded, the advance made by the parties to the second part, or by the board of directors, to be repaid also from the proceeds of the sales of such bonds.

Sixth. The parties of the second part hereby further agree, in consideration of the premises, to pay to the party of the first part the sum of two thousand pounds sterling upon the execution of these presents. The parties of the second part also agree that they will cause to be paid to Edmund Rice, president and attorney as aforesaid, or to his order, for the use of the party of the first part, the sum of thirty thousand pounds sterling, said sum to be paid by instalments, but not to the prejudice of the construction of said branch railroad during its said construction, so as to embarrass or delay the construction thereof, and such payments may be either made in cash or in the bonds above referred to at their cash market value.

Seventh. It is further agreed that the parties of the second part hereby assume to accept and conform to the provisions of the agreement made by and between the parties of the first part and A. B. Smith and Z. G. Simmons for the construction, maintenance and operation of an electric telegraph along the line of said branch railroad, and dated September 21st, 1863.

Eighth. That mutual and exclusive close running connection between the said branch railroad from Winona to Saint Paul, and all the railroads of the party of the first part as to the transportation of freight and passengers and the transaction of all business over all the respective lines of railroad north of or leading into Saint Paul, shall be agreed upon and entered into. The

The party of the first part retaining thirty-three and one-third per cent. (33⅓) of the shares, and which shares are to stand upon the same footing as the shares relating to the road from Winona to Saint Paul.

This agreement is subject to the ratification of the stockholders of the party of the first part.

131 Done in duplicate at the city of Manchester, England, on the day and year first above written.

(Signed) EDMUND RICE,
Pres. and Atty. St. Paul & Pacific R. R. Co.
HENRY THORNTON.
J. G. T. CHILD.

132 U. S. circuit court, southern district of New York.

SAMUEL McLEAN
vs.
THE ST. PAUL AND CHICAGO RAILWAY CO.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Clarence W. Francis, being duly sworn, deposes and says that he is managing clerk in the office of Charles W. Bangs, the attorney for the defendant in this action; that the foregoing is a copy of the pleadings in this action, the originals not being on file in the State court.

CLARENCE W. FRANCIS.

Sworn to before me, this 17th day of October, 1879.

[L. S.] THOS KILOERT,
Notary Public, New York County.

133 (Endorsed:) N. Y. common pleas. Samuel McLean agt. The St. Paul and Chicago Railway Co. (Copy.) Pleadings. C. W. Bangs, deft's att'y. U. S. circuit court; filed Oct. 20, 1879. John I. Davenport, clerk.

134 Court of common pleas, city and county of New York.

SAMUEL McLEAN
against
THE ST. PAUL AND CHICAGO RAILWAY COMPANY.

To the court of common pleas of the city and county of New York:

The petition of the St. Paul and Chicago Railway Company the defendant in the above entitled action respectfully represents that this action was commenced, and is now pending in the court of common pleas for the city and county of New York, by Samuel McLean, a citizen of the State of New York, against your peti-

tioner, the St. Paul and Chicago Railway Company, and that the said company is, and is alleged in the complaint, to be a corporation created and existing under and by virtue of the laws of the State of Minnesota, and that it is alleged in the complaint that the plaintiff is a resident of the city of Brooklyn, county of
135 Kings, and State of New York; and the plaintiff is and was at the time of the commencement of this action, a citizen of the State of New York, and the defendant corporation is and was at the time of the commencement of this action, a citizen of the State of Minnesota, and that the matter in dispute in this action exceeds, exclusive of costs, the sum or value of five hundred dollars. The defendant has appeared in this action in this court and answered the complaint of the plaintiff therein, and the said action has not yet been tried, nor has there been any term of this court passed since the said action was commenced at which the same could be tried.

Wherefore your petitioner prays that the said suit may be removed from this court to the circuit court of the United States for the southern district of New York, and that this court will proceed no further in this action.

Dated May 28, 1879.

St. Paul and Chicago Railway Company,
By JAMES M. McKINLAY,
President.

[SEAL.] C. W. BANGS,
Attorney for Defendant, Petitioner, &c.

136 CITY AND COUNTY OF NEW YORK, *ss:*

James M. McKinlay, being duly sworn, deposes and says that he is the president of the St. Paul and Chicago Railway Company, the defendant in the above-entitled action and the petitioner above named, and that the foregoing petition is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JAMES M. McKINLAY.

Sworn to before me, this 24th day of May, 1879.

THOS. W. FITZGERALD,
Notary Public Rich. Co., cer. filed in N. Y. Co.

137 Know all men by these presents, that the St. Paul and Chicago Railway Company and Julius Wadsworth, of the city of New York, as surety, are held and firmly bound unto Samuel McLean, of the City of Brooklyn, Kings county, and State of New York, in the sum of two hundred and fifty dollars, lawful money of the United States, to be paid to the said Samuel McLean, his executors, administrators, and assigns, for which payment well and truly

to be made the said St. Paul and Chicago Railway Company binds itself, and the said Julius Wadsworth binds himself jointly and severally firmly by these presents.

Sealed with the seals of the said St. Paul and Chicago Railway Company and of the said Julius Wadsworth, the 28th day of May, 1879.

Whereas the said Samuel McLean, a citizen of the State of New York, has commenced an action in the court of common pleas for the city and county of New York against the St. Paul and Chicago Railway Company, a citizen of the State of Minnesota, which is now pending in said court, and the matter
138 in dispute in said action exceeds, exclusive of costs, the sum of five hundred dollars, and the said action involves a controversy between citizens of different States, and the said St. Paul and Chicago Railway Company desire the removal of the said suit into the circuit court of the United States for the southern district of New York, and are about to file in the said Court of Common Pleas for the city and county of New York, in the said suit, a petition for the removal of the said suit into the said circuit court of the United States for the southern district of New York, in which district the said suit is pending.

Now, therefore, the condition of this obligation is such that if the said St. Paul and Chicago Railway Company shall enter in said circuit court on the first day of its next session a copy of the record in said suit of the said Samuel McLean against the said St. Paul and Chicago Railway Company in the said Court of Common Pleas, and shall pay all costs that may be awarded by the said circuit court if the said circuit court shall hold that said suit was wrongfully or improperly removed thereto, and if the said St. Paul and Chicago Railway Company shall there appear and enter special bail in such suit, if special bail was originally requisite therein, then this ob-
139 ligation to be void; otherwise to remain in full force and virtue.

[Seal of Company.] St. Paul and Chicago Railway Company,
By JAMES M. McKINLAY,
President.
JULIUS WADSWORTH. [SEAL.]

Sealed and delivered in the presence of—
THOS. W. FITZGERALD.

CITY AND COUNTY OF NEW YORK, *ss*:

On the 28th day of May, 1879, before me personally came James M. McKinlay, to me known and known to me to be the same person who signed and executed the foregoing instrument as the president of the St. Paul and Chicago Railway Com-

pany, and having been by me duly sworn, did depose and say and acknowledge that he executed said instrument in the name of the said St. Paul and Chicago Railway Company as the president of the said company, and on behalf of and as the act and deed of the said St. Paul and Chicago Railway Company, and that
140 he executed the same under authority pertaining to his office as president of the said company, and that he, the said James M. McKinlay, was and is the president of the said company, and that the seal affixed to said instrument is the corporate seal of said St. Paul and Chicago Railway Company and was affixed thereto by authority of said company.

JAMES M. McKINLAY.

THOS. W. FITZGERALD,
Notary Public Rich. Co., cer. filed in N. Y. Co.

CITY AND COUNTY OF NEW YORK, *ss:*

On this 28th day of May, 1879, before me personally came Julius Wadsworth, to me known to be the same person described in and who executed the foregoing instrument, as the surety therein named, and acknowledged to me that he executed the same, and the said Julius Wadworth having been by me duly sworn did depose and say that he was worth the sum of five hundred dollars, over and above all his debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under execution.

THOS. W. FITZGERALD,
Notary Public Rich. Co., cer. filed in N. Y. Co.

141 At a special term of the court of common pleas for the city and county of New York, held at the court house in the city of New York, on the 2d day of June, 1879.

Present: Hon. George M. Van Hoesen, J.

SAMUEL McLEAN
vs.
THE ST. PAUL AND CHICAGO RAILWAY COMPANY.

The defendant in this action, the St. Paul and Chicago Railway Company, a corporation created under and by virtue of the laws of the State of Minnesota, having filed a petition in this suit in this court, whereby it appears that the plaintiff in this action is and was at the time of the commencement of this action a citizen of the State of New York, and that the defendant was at the time of the commencement of this action and now is a citizen of the State of Minnesota, and that this is an action between citizens of different States, and the matter in dispute exclusive of costs exceeds the sum or value of five hundred dollars, and the said defendant having by said petition prayed for the removal

of this suit into the circuit court of the United States for the southern district of New York, and having made and filed with the said petition a bond with good and sufficient surety
142 for the defendant entering in said circuit court on the first day of its session a copy of the record of such suit in this court, and for paying all costs that may be awarded by the said circuit court of the United States if the said court shall hold that this suit was wrongfully or improperly removed thereto, and also for there appearing and entering special bail in such suit if special bail was originally requisite therein.

Now on reading and filing a copy of the pleadings in said action in this court, and the said petition and bond, and on motion of Mr. C. W. Bangs, attorney for the defendant in this action, it is ordered, that the said petition and bond be accepted, and it is hereby declared that this court will proceed no further in this suit, the said suit being removed to the said circuit court of the United States for the southern district of New York.

A Copy. NATH'L JARVIS, Jr., *Clerk.*

143 New York Common Pleas.

SAMUEL MCLEAN
vs.
THE ST. PAUL & CHICAGO RAILWAY COMPANY.

CITY AND COUNTY OF NEW YORK, *ss:*

Adrian S. Marter being duly sworn, deposes and says that on the third day of June, 1879, he served the petition, bond, order and notice of entry thereof, of which a copy is hereto annexed, upon D. M. Porter, Esq., the attorney for the plaintiff herein, by delivering a copy of the said papers to him personally, at his office, No. 3 Broad street, in the city of New York, and leaving the same with him. ADRIAN S. MARTER.

Sworn before me, this 4th day of June, 1879.

THOS. W. FITZGERALD,
Notary Public, Rich. Co., Cer. filed in N. Y. Co.

144 New York Common Pleas.

SAMUEL MCLEAN
vs.
THE ST. PAUL AND CHICAGO RAILWAY COMPANY.

I, Nath'l Jarvis, Jr., clerk of the court of common pleas for the city and county of New York, do hereby certify that annexed hereto is a copy of the record in the above entitled cause, and all papers relating thereto on file in my office.

Given under my hand and the seal of the said court, this 20th day of October, 1879.

[SEAL.] NATH'L. JARVIS, Jr., *Clerk.*

Endorsed: U. S. circuit court, southern district of New York. Samuel McLean agst. The St. Paul and Chicago Railway Company. Certified copies, petition, bond, and order of re-
145 moval. C. W. Bangs, attorney for defendant. U. S. circuit court, filed October 20, 1879. John I. Davenport, clerk.

146 United States circuit court, southern district of New York.

SAMUEL McLEAN
vs.
THE ST. PAUL AND CHICAGO R. R. Co.

This cause having been commenced in the court of common pleas of New York, and having been removed into this court upon the application of the defendants, and said defendants having this day filed a copy of the record in this action, duly certified by the clerk of the said court of common pleas, and having appeared by C. W. Bangs, attorney for said defendants.

Now, on motion of C. W. Bangs, attorney for said defendants, It is ordered, that this cause do proceed in this court in the same manner as if it had originally been commenced
147 therein, and that the appearance of the defendants be, and the same is hereby, noted.

Dated October 20, 1879.

148 In the circuit court of the United States for the southern district of New York.

SAMUEL McLEAN, Plaintiff,
against
THE ST. PAUL AND CHICAGO RAILWAY COMPANY, Defendant.

SIR: Take notice that upon the summons, complaint, answer, petitions, bonds for the removal and the orders made thereon removing this cause into this court, and the records of the court of common pleas of the city and county of New York and all the other papers heretofore served or filed in this action in the said court of common pleas, and upon the records of adjudication in and order made by the circuit court of the United States for the southern district of New York and all the other papers heretofore served or filed in this action in said circuit court and upon the affidavit of D. M. Porter, a copy of which is herewith served upon you, a motion will be made at a circuit court of the United States for the southern district of New York, to be held in the court-room thereof in the new post-office building, in the
149 city and State of New York, on the 24th day of October, 1879, at 11 o'clock in the forenoon of that day, or as soon

thereafter as counsel can be heard, that the above-entitled action be remanded from this court to the court of common pleas for the city and county of New York, with costs.

Dated New York, October 20, 1879.

Yours, &c.,

D. M. PORTER,
Plaintiff's Attorney.

To C. W. BANGS, Esq.,
Defendant's Attorney.

150 In the circuit court of the United States for the southern district of New York.

SAMUEL MCLEAN, Plaintiff,
against
THE ST. PAUL AND CHICAGO RAILWAY COMPANY, Defendant.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

D. M. Porter, being duly sworn, deposes and says that he is the plaintiff's attorney in the above entitled action; that it was commenced in the court of common pleas of the city and county of New York on the 7th day of February, 1879, and the defendant on the 27th day of February, 1879, entered its appearance and served its answer to the complaint in this action, and an issue of fact was made in this action by such answer, which issue continues.

Deponent further says that on March 8, 1879, the defendant served its petition and bond in the usual form to remove causes from the State to the Federal courts, with notice of motion for such removal to be heard on the 17th day of March, 1879,
151 on which day the said bond was approved, and an order was entered in the said court of common pleas approving said bond and removing said cause from the said court of common pleas to the circuit court of the United States for the southern district of New York, and which order was so duly entered and was served upon the plaintiff on or about the 19th day of March, 1879.

Deponent further says that the next term of the circuit court of the United States for the southern district of New York was on the first Monday of April, 1879, but the defendant did not file or enter the record on the next day of the term, as it had bound itself to do in the aforesaid bond; that a motion was made in the said circuit court of the United States for the southern district of New York by the plaintiff to remand said cause because of such omission, and on or about the 26th day of May, 1879, the said circuit court ordered and adjudged that this cause be remanded from the said circuit court to the said court of common

pleas, which order and judgment was duly entered in this action on the said 26th day of May, 1879, and the record thereof was thereafter on the same day filed in the office of the clerk
152 of this court, and the record thereof was thereafter, on the same day, served upon the attorney for the defendant, and a certified copy of said order was filed and entered in said court of common pleas, to wit, in the office of the clerk of said court in the county court-house in the city of New York.

Deponent further says that thereafter, on or about the 3d day of June, 1879, the defendant, without notice to the plaintiff, entered an order in the said court of common pleas of the city and county of New York, and filed its petition and its bond, approved by a judge of said court of common pleas, removing this cause from said court of common pleas to the said circuit court of the United States for the southern district of New York, and on the same day served a copy of said petition, bond, and order upon the plaintiff herein, which were the second petition, bond, and order for the removal of this cause.

Deponent further says that after this cause was at issue in the said court of common pleas of the city and county of New York, in the month of February, 1879, terms of said court for the trial of issues of fact were held, and said court was actually in session for the trial of issues of fact during the balance of the
152 month of February, 1879, and the said cause could, according to the rule and practice of said court, have been tried during that month; that in the month of March, 1879, before the service of the notice of motion to remove said cause from the said court of common pleas to the said circuit court of the United States for the southern district of New York, terms of said court of common pleas for the trial of issues of fact were held, and said court was actually in session for the trial of issues of fact, and according to the rules and practice of said court said issue of fact in this action might have been tried; that during the month of April, 1879, terms of said court of common pleas, for the trial of issues of fact were held, and said court was actually in session for the trial of issues of fact, and according to the rules and practice of this court said issue of fact in this action could have been tried; that during the month of May, 1879, terms of said court of common pleas, for the trial of issues of fact, were held, and said court was actually in session for the trial of issues of fact, both before and after said order remanding this action from the circuit court of the United States for the southern district of New York to the said court of com-
154 mon pleas had been filed in the said court, to wit, in the office of the clerk of said court of common pleas, and according to the rules and practice of said court said issue of fact in this action might have been tried during the month of May,

1879, both before and after said order was so filed, as aforesaid; that during the month of June, 1879, terms of said court of common pleas were held for the trial of issues of fact; and said court was actually in session for the trial of such issues, and according to the rules and practice of said court said issues of fact in this action might have been tried on the 2d day of June, 1879.

Deponent further says that plaintiff was, at the commencement of this action, and still is a resident and citizen of the State of New York, and defendant was, at the commencement of this action, and still is, a corporation created by and existing under the laws of the State of Minnesota, and is a citizen of the State of Minnesota, and that the defendant did not petition for the removal of this cause from the said court of common pleas to the said circuit court of the United States at the time of the entry of its appearance in the said State court, as it was required to
155 do by the first subdivision of section 639 of the Revised Statutes of the United States, as re-enacted in the year 1878.

D. M. PORTER.

Sworn to before me, this 20th day of October, 1879.

GEORGE H. KRACHT,
[SEAL.] *Notary Public, N. Y. Co.*

CITY AND COUNTY OF NEW YORK, *ss:*

James F. Pendleton being duly sworn, deposes and says: that he is a clerk in the office of D. M. Porter, Esq., the plaintiff's attorney herein, and that on the 20th day of October, 1879, in the office of C. W. Bangs, the defendant's attorney herein, at No. 137 Broadway, in the city of New York, he served upon said C. W. Bangs, as the attorney for the defendant herein, as aforesaid, the foregoing affidavit, and notice of motion, by delivery to and leaving with the managing clerk in said office, a true copy thereof.

The deponent further says that at the time of such service, as aforesaid, the said C. W. Bangs, was absent from his
156 office, which was after the record was filed in this case.

JAMES F. PENDLETON.

Sworn to before me, October 21st, 1879.

GEORGE H. KRACHT,
[SEAL.] *Notary Public, N. Y. Co.*

(Endorsed:) U. S. circuit court. Samuel McLean, plaintiff, agst. The St. Paul and Chicago Railway Company, defendant. Affidavit and notice of motion to remand, &c. D. M. Porter, plff's attorney, Drexel Building, Wall st., cor. Broad, New York. U. S. circuit court, filed Dec. 23, 1879. John I. Davenport, clerk.

United States circuit court for the southern district of New York.

SAMUEL MCLEAN, Plaintiff,
against
THE ST. PAUL AND CHICAGO RAILWAY COMPANY, Defendant.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles W. Bangs, being duly sworn, deposes and says that he is the attorney for the defendant in the above-entitled action, which is an action at law, originally commenced in the court of common pleas for the city and county of New York, on the 7th of February, 1879, for the recovery of the sum of one hundred and five thousand dollars, with interest from the 31st day of December, 1867. Issue was joined in the action by the answer
158 of the defendant to the complaint in said court of common pleas on the 27th of February, 1879, and the defendant appeared in the action and entered its appearance only by the service of its said answer.

Deponent further says that it is not true that any term or terms of the said court of common pleas for the city and county of New York for the trial of issues of fact occurred or was or were held at which this cause could be tried in the said court, before the order for the removal of the said cause to this court, which was made in the said court of common pleas for the city and county of New York on the 2d day of June, 1879, was made, or before the petition for the removal of this action from the said court of common pleas to this court, dated the 28th of May, 1879,
159 and the bond upon said removal were filed in said court of common pleas, or before the said bond was accepted by said court. And deponent denies that any such term or terms of the said court of common pleas was or were held in the month of February, 1879, at which this action could have been tried in the said court, according to the rules and practice of said court, after the said cause of action was at issue in the said court of common pleas, for the reason that the said cause was not at issue until the day before the last day of the said month of February, and the said cause could not be tried in the said court at or during the term at which issue was joined therein.

Deponent further says that it is not true that in the month of March, 1879, or before the service of any papers for the
160 removal of this cause or action from the said court of common pleas for the city and county of New York to this court, terms of the said court of common pleas for the trial of issues of fact were held at which according to the rules and practice of the said court of common pleas the issues of fact joined in this action in said court could have been tried, or could be

first tried, for the reason that issue was not joined in the said action at a time sufficiently before the commencement of the March term of the said court of common pleas to enable the plaintiff to give notice of the trial of the said action for the said March term of the court of common pleas, or to put the cause upon the trial term calendar of the said court for that term, and the same
161 was not so noticed, and was not upon the trial term calendar of the said court for the March term of 1879, and the said cause could not have been tried at the said term according to any rules or practice of the said court.

Deponent further says that it is not true that during the month of April, 1879, terms of said court of common pleas for the trial of issues of fact were held in the said court of common pleas, at which, according to the rules and practice of the said court, the issues of fact joined in this action in said court could have been tried, nor could the issues of fact joined in this action have been first tried at any term of the said court of common pleas for the city and county of New York, held in or during the month of April, 1879, for this reason, among others, viz., that prior
162 to the said month of April, 1879, this action had been and was duly removed from said court of common pleas for the city and county of New York into this court, and that during the month of April, 1879, this cause or action was not pending in the said court of common pleas for the city and county of New York, but had been by the said court before that time declared to have been and to be removed into this court; and the said court had declared that it would proceed no further in this action, and this cause was not placed upon any calendar of the said court of common pleas, and was not upon any such calendar during the month of April, 1879, for trial, and could not by any rules or practice of the said court, or by law, have been
163 tried in the said court during the month of April, 1879, or during any term of said court of common pleas held during the said month of April, 1879.

Deponent further says that no term of the said court of common pleas for the trial of issues of fact was held during the month of May, 1879, at which this cause could have been tried according to the rules and practice of the said court of common pleas or otherwise, for the reason that this cause or action was not pending in the said court of common pleas for the city and county of New York during the month of May, 1879, or pending any term held for the trial of issues of fact in said court of common pleas in said month, but that this cause was during the said month pending in this court, and had not been removed to the
164 said court of common pleas in time to be, or at any time during the said month of May, 1879, at which it could be tried or noticed for trial, or placed upon the calendar of the said

court of common pleas for the month of May, 1879, or for any term of said court of common pleas for the trial of issues of fact held during the said month of May, 1879.

Deponent further says that is not true that during the month of June, 1879, terms of said court of common pleas were held for the trial of issues of fact, at which, according to the rules and practice of said court, the issues of fact joined in this action might or could have been tried, nor could the issues of fact in this action have been first tried at any term of the said court of common pleas held in the month of June, 1879, for the
165 reason that said cause or action was not removed to or pending in said court of common pleas at a time sufficiently prior to the commencement of the June term of the said court of common pleas to enable the plaintiff to give notice of trial thereof for the said June term, or to place the said cause upon any calendar of the said court for the said June term, and that the said cause was not at any time noticed for trial in the said court of common pleas by the plaintiff according to the rules and practice of the said court, for any June term of the said court of common pleas, or for any term of the said court of common pleas to be held in the month of June, and was not upon the calendar of the said court of common pleas for any term of said court held during the month of June, 1879, and that the
166 said cause has never been, as deponent is informed and believes, upon any calendar of the said court at which causes could be tried, at any time since the said cause or action was at issue in the said court, prior to the removal of the said cause to this court or at any other time.

C. W. BANGS.

Sworn to before me this 24th day of October, 1879.

WM. S. BAINTON,

[SEAL.] (35) *Notary Public N. Y. Co.*

U. S. circuit court. Samuel McLean *vs.* the St. Paul & Chicago Railway Company. Affidavit to oppose motion to remand, &c. C. W. Bangs, att'y for deft. U. S. circuit court. Filed Dec. 23, 1879. John I. Davenport, clerk.

167 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court room, in the city of New York, on the fourteenth day of November, in the year of our Lord, one thousand eight hundred and seventy-nine.

Present, the Honorable Samuel Blatchford, circuit judge.

McLEAN
vs.
THE ST. PAUL AND CHICAGO RAILROAD COMPANY.

A motion in the above cause to remand the same to the New York court of common pleas coming on to be heard—

Mr. David M. Porter is heard in behalf of the plaintiff.

Mr. Charles W. Bangs is heard in behalf of the defendant.

C. A. V.

168 Circuit court of the United States for the southern district of New York.

SAMUEL McLEAN
vs.
THE ST. PAUL AND CHICAGO RAILWAY COMPANY.

BLATCHFORD, J.—A petition by the defendant and a bond for the removal of this suit into this court were filed in the State court in which the suit was pending on the 17th of March, 1879, and on that day the State court made an order that the petition and bond be accepted and filed, "and that this court will proceed no further in this suit, and it is hereby declared that the said suit is removed to the said circuit court of the United States for the southern district of New York." The defendant ought to have filed a copy of the record in this court by the 7th of April, but did not until the 10th of April. For that cause this court made an order on the 24th of May, on motion of the plaintiff,
169 remanding the cause to the State court. On the 2d of June, 1879, the defendant filed in the State court a petition and bond for the removal of the cause into this court, and the State court made an order on that day that said petition and bond be accepted, and "this court will proceed no further in this suit, the said suit being removed to the said circuit court of the United States for the southern district of New York."

A copy of the record in this suit having been filed in this court in due time by the defendant, and the defendant having appeared in the suit in this court, the plaintiff now moves, on various grounds, to remand the cause to the State court.

It is contended that under subdivision one of section 639 of the Revised Statutes of the United States the petition for removal in this case should have been filed in the State court at the time the appearance of the defendant was entered in the State court. This is on the idea that such subdivision was in force, as respects this suit. But, as the removal of this case is provided for by
170 sections 2 and 3 of the act of March 3d, 1875, (18 U. S. Stat. at Large, 470, 471,) those sections supersede and take the place of, in regard to this suit, such subdivision.

Under the act of 1875 the petition was in time if filed before or at the term at which the cause "could be first tried and before the trial thereof." It is suggested for the plaintiff that the second edition of the Revised Statutes, printed and promulgated in 1878, is a re-enactment of the Revised Statutes in 1878, and that subdivision one of section 639 found in it, displaces the act of 1875. This is an error. The Revised Statutes were enacted June 22, 1874. The new or second edition authorized by the act of March 2, 1877, (19 U. S. Stat. at Large, 268,) in the Revised Statutes as enacted June 22, 1874, with all amendments made between December 1, 1873, and March 4, 1877. By section 5, 601 of the Revised Statutes all acts passed after December 1, 1873, are left in force as if passed after June 22, 1874. The publication of the second edition of the Revised Statutes does
171 not affect any statute passed subsequently to December 1, 1873. It does not affect the act of March 3, 1875, nor reinstate subdivision one of section 639, as applicable to this suit.

It is urged that the bond in this case was not the proper bond because its condition was not that provided for by section 639 of the Revised Statutes, but that provided for by section 3 of the act of 1875. As the suit is one mentioned in section 2 of that act the proper conditions of the bond was that prescribed by section 3 of that act.

It is further urged that the petition filed June 2, 1879, was not filed before or at the term at which the cause "could be first tried" in the State court, although filed before the trial of the cause in that court.

Issue was joined in the suit by the answer of the defendant, in the State court, February 27, 1879. The order of removal made by the State court March 17, 1879, states that the petition
172 for removal that day filed is filed "before the term at which this cause could be first tried in this court." This is an adjudication of that fact by the State court. Even if such an adjudication would be reviewed by this court, it is apparent that the cause could not have been tried before the March term, 1879, of the State court, and at that term the petition was filed. It is plain from sections 979 and 980 of the Code of New York that the cause could not have been noticed for trial or put on the calendar of the State court for the March term, or regularly brought to trial at that term except by consent.

The term at which the cause "could be first tried" is the term at which, under the legislation of the State and the rules of practice pursuant thereto, the cause is first triable, that is, subject to be tried on its merits. (Dillon on Renewal of Causes, 2d ed., p. 57; Ames *vs.* Colorado Central R. R. Co., 4 Dillon, 260; Fulton *vs.* Golden, 20 Albany Law Journal, 229.)

On the 17th of March, 1879, the State court declared by
173 order of that date that it would proceed no further in the suit, and that the suit was removed to this court. This was equivalent to saying it would not try the cause. This state of things continued until this court, by its order of May 24th, remanded the cause to the State court. Then, under the State legislation and practice, the term at which the cause could be first tried was the June term, and at or before that term the new petition for removal was filed. So far, therefore, as the question of time is concerned, the new petition was filed in time under the act of 1875.

It is further urged that the defendant having once removed the cause to this court, and having failed to perfect the removal by neglect to file the record in time in this court, and the cause having been remanded to the State court for that reason, the right to remove the cause has been lost, because the delay is prejudicial to the plaintiff, and that if the right to remove is to be allowed in this case under such circumstances the same course might be repeated *ad infinitum*.

174 That a defendant may waive his right to remove a cause is plain. (Hanover Nat. Bank *vs.* Smith, 13 Blatchf. C. C. R., 224.) He ought to be held to have waived, if where he has attempted to exercise at once and has failed by neglect to perfect the removal, and where to allow the subsequent removal, would make effective the delay of the cause, to the presumed prejudice of the plaintiff, for the time elapsed after the failure to perfect the removal occurred.

That is the present case.

The defendant calls attention to the recent decision of the Supreme Court in Meyer *vs.* The Construction Co., and claims that under that decision this cause ought not to have been remanded before, and therefore ought to be retained here now. The Supreme Court in that case says that it does not appear by the statute that the circuit court is to be deprived of its jurisdiction, if "by accident" the party is delayed until a later day than the first day of the term of the circuit court in filing a copy
175 of the record of the State court; and that if the circuit court, for good cause shown, accepts the transfer after the day and during the term, its jurisdiction will, as a general rule, be complete, and the removal properly effected.

The affidavit of the defendant's attorney, furnished to the court on the first motion to remand, purporting to give an excuse in this case for not filing the copy of the record on the first removal on the first day of the April term, and to make out a case of "accident," contained the following on that subject, and nothing more: "And deponent says that by inadvertence, during his (deponent's) absence from his office on the 7th April, instant, the

record in said cause of the said proceedings in the court of common pleas of the city and county of New York in the said action, and a copy of the pleadings therein was not filed in this court on that day, and that deponent did not discover that the same had not been filed until the 10th instant." This affidavit does not make out a case of accident. Facts are not stated from which the court can see that there was an inadvertence or an accident.

176 The conclusion of inadvertence is sworn to. The certified copy of the petition for removal, bond and order of removal, filed in this court on the 10th of April, was certified by the clerk of the State court on the 18th of March. No reason is shown why it was not filed here before the 7th of April, as it might have been. This court did not accept the transfer, but remanded the cause. It did so on what then appeared, and still appears, to be a proper ground. This court could not now vacate the order of May 24th remanding the cause on the furnishing now by the defendant of an affidavit showing what would have been held to be a satisfactory excuse for not having filed the first record in time, or a case of "accident." The defendant had his day in court at that time, and the matter became *res adjudicata*, not to be reopened because of any facts then existing, and which might have been then shown. Moreover the defendant has acquiesced in the former remand and waived all right

177 to claim that the cause is in this court under the first removal by averring in its second petition for removal that the suit "is now," May 28th, 1879, (that being the day the petition is sworn to by the president of the defendant corporation,) "pending in the court of common pleas for the city and county of New York," and praying for its removal from that court to this court.

The motion to remand the cause to the State court is granted, with costs.

D. M. PORTER,
For the Plaintiff.

C. W. BANGS,
For the Defendant.

178 (Endorsed:) Circuit court of the United States for the southern district of New York. Samuel McLean *vs.* The St. Paul and Chicago Railway Company. (Copy.) Decision Dec'r 22d, 1879. Original filed Dec. 22, 1879.

179 At a stated term of the circuit court of the United States for the southern district of New York, held in the court room thereof, in the new post office building, in the city and State of New York, on the 27th day of December, 1879.

Present: Hon. Samuel Blatchford, Judge.

SAMUEL MCLEAN, Plaintiff,
vs.
THE ST. PAUL AND CHICAGO RAILWAY COMPANY, Defendant.

Upon reading and filing the record and judgment remanding this cause to the State court upon its first removal into this court, including the motion papers to procure such remand read
180 by the plaintiff, and the papers read by the defendant in opposition thereto, and also upon reading and filing the record on the second alleged removal of this cause to this court, and the affidavit of D. M. Porter, and the notice of motion to remand this cause a second time to the State court, and the affidavit of C. W. Bangs, and after hearing Mr. D. M. Porter, of counsel for the plaintiff, for the motion to remand the cause a second time to the State court, and Mr. F. N. Bangs, of counsel, for the defendant, opposed.

It is ordered, that the plaintiff's motion to remand this cause a second time to the State court, to wit, the court of common pleas for the city and county of New York, be and the same is hereby granted, and the said cause is hereby a second time remanded to the said last-named court with $10.00 costs
181 and $2.85 disbursements, amounting in the aggregate to $12.85, to be paid by the defendant to the plaintiff.

SAMUEL BLATCHFORD.

CITY AND COUNTY OF NEW YORK, *ss:*

James F. Mooney, being duly sworn, deposes and says, that on the 24th day of December, 1879, at No. 137 Broadway, in the the city of New York, he served the within proposed order on C. W. Bangs, Esq., the attorney for the defendants within named by delivery to and leaving with a clerk in charge of his office a true copy thereof.

Deponent further says that at the time of such service the said attorney was absent from his office.

JAMES F. MOONEY.

Sworn to before me this 24th day of December, 1879.
GEORGE H. KRACHT,
Notary Public, N. Y. Co.

182 (Endorsed:) U. S. circuit court. Samuel McLean, plaintiff, *agt.* The St. Paul and Chicago Railway Company, defendant. Proposed order remanding case to the State court, and notice of settlement. D. M. Porter, pl'ff's attorney.

DREXEL BUILDING, WALL ST., COR. BROAD, NEW YORK.

SIR: Please take notice that an order of which the within is

a copy, will be presented to his honor Judge Blatchford, at a stated term of the U. S. circuit court, in the court room thereof, in the new post office building, on the 27th day of December, 1879, at 11 o'clock A. M., for settlement.

Dated at New York, December 24th, 1879.

Yours, &c., D. M. PORTER,
Plaintiff's Attorney.

To C. W. BANGS, ESQ.,
Defendant's Atty.

U. S. circuit court. Filed December 27, 1879.
JOHN I. DAVENPORT, *Clerk.*

183 Circuit court of the United States of America, in the southern district of New York, in the second circuit.

SAMUEL MCLEAN
vs.
THE ST. PAUL & CHICAGO RAILWAY COMPANY.

Know all men by these presents, that we, Russell Sage and Nathaniel A. Cowdrey, of the city of New York, are held and firmly bound unto the above-named Samuel McLean, in the sum of five hundred dollars, to be paid to the said Samuel McLean, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

184 Sealed with our seals, and dated the second day of January, in the year of our Lord one thousand eight hundred and eighty.

Whereas, the above-named, the St. Paul & Chicago Railway Company, has prosecuted a writ of error to the circuit court of the United States for the southern district of New York, from the Supreme Court of the United States, to reverse the orders made in the above entitled suit by the judge of the circuit court of the United States for the southern district of New York, on the 24th day of May, 1879, and the 27th day of December, 1879, remanding this cause to the State court with costs.

Now, therefore, the condition of this obligation is such, that if the above-named St. Paul & Chicago Railway Company shall prosecute said writ of error to effect and answer all dama-

185 ges and costs, if it shall fail to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

RUSSELL SAGE. [L. S.]
N. A. COWDREY. [L. S.]

Sealed and delivered and taken and acknowledged this 2d day of January, 1880, before me.

THOS. W. FITZGERALD,
Notary Public, Rich. Co.,
Cer. filed in N. Y. Co., N. Y. State.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Russell Sage and Nathaniel A. Cowdrey, being duly sworn, depose and say, and each for himself says, that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

RUSSELL SAGE.
N. A. COWDREY.

Sworn to before me this 2d day of January, 1880.

THOS. W. FITZGERALD,
Notary Public, Richmond County,
Certificate filed in New York County, State of New York.

186 The foregoing bond is approved, January 3, 1880.

SAM'L BLATCHFORD,
Circuit Judge.

U. S. circuit court, southern district of New York. Samuel McLean *vs.* The St. Paul & Chicago Railway Co. Bond on writ of error. U. S. circuit court; filed Jan'y 3, 1880. John I. Davenport, clerk.

187 UNITED STATES OF AMERICA, *ss:*

To SAMUEL MCLEAN, greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden before the Justices thereof at the Capitol, in the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, in an action wherein the St. Paul and Chicago Railway Company, defendant, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the orders in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this third day of January, eighteen hundred and eighty.

SAM'L BLATCHFORD,
Circuit Judge.

188 U. S. Circuit Court. Samuel McLean *vs.* The St. Paul & Chicago Railway Co. Citation on writ of error. C. W. Bangs, defendant's atttorney.

Service of a copy of the within is hereby admitted without prejudice. N. Y., Jan. 3, 1880.

D. M. PORTER,
Plff.'s Atty.

U. S. Circuit Court, Jan. 5, 1880.

JOHN I. DAVENPORT,
Clerk.

(Endorsed on cover:) S. New York C. C. U. S. No. 1114. The St. Paul and Chicago Railway Company, Plaintiff in error, *vs.* Samuel McLean. Filed 3d February, 1880.

108-212

OFFICE SUPREME COURT
FILED
FEB 17 1883

SUPREME COURT OF THE UNITED STATES.

No. 174. October Term, 1882.

THE ST. PAUL AND CHICAGO RAILWAY CO.,
Plaintiff in Error,

vs.

SAMUEL McLEAN,
Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of New York.

BRIEF, &c., FOR PLAINTIFF IN ERROR.

C. W. BANGS,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1882.—No. 174.

THE ST. PAUL AND CHICAGO RAILWAY COMPANY,
Plaintiff in Error,

vs.

SAMUEL MCLEAN,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Abstract and Statement of the Case.

The writ of error in this case was sued out under sec. 5 of the Act of March 3, 1875, and brings up for review certain orders of the Circuit Court of the United States, for the Southern District of New York, *remanding* the cause from said court to the Court of Common Pleas of the City and County of New York (*fo.* 1).

It involves a question of *removal* of a cause from a State o a Federal Court under the *Act of Congress of March* 3, 1875; or the right to have a case which has been removed under that act *remanded* to the State Court.

The facts appearing by the record, are as follows:

1. On the 7th of February, 1879, Samuel McLean, the defendant in error here, commenced an action, in the nature of a suit at law, in the Court of Common Pleas for the City and County of New York, against the St. Paul and Chicago Railway Company (the plaintiff in error) (*fo.* 5 and 6), to recover the sum of $105,000, with interest (*fo.* 18), upon an alleged contract.

The complaint alleged that the defendant in the suit, The St. Paul and Chicago Railway Company, was a Minnesota corporation (*fo.* 6 and 8), and that the plaintiff was a resident of the State of New York (*fo.* 10).

2. The defendant appeared in the action and answered the complaint, February 27, 1879 (*fo.* 20–26).

3. On March 3 or 4, 1879 (*fo.* 44), The St. Paul and Chicago Railway Company, the defendant, made a duly verified petition addressed to the N. Y. Court of Common Pleas, alleging the commencement of the action, that the defendant was a corporation created and existing under the laws of the State of Minnesota, and that the defendant was a citizen of the State of New York (*fo.* 42–43); that the matter in dispute in the action exceeded, exclusive of costs, the sum of $500; that the action was at issue and untried, and there had not been any term of said court at which it could be tried; and thereupon prayed that the suit might be removed to the United States Circuit Court for the Southern District of New York, in which district the suit was pending (*fo.* 44).

The petition was accompanied by a bond executed by the railway company, defendant, and a sufficient surety, reciting the petition and the facts stated in it, and conditioned that the defendant railway company should enter in the United States Circuit Court on the first day of its next session, a copy of the record in the suit, and that the defendant should there appear, &c. (*fo.* 46–48–50).

4. Upon filing the petition and bond, the Court of Common Pleas, on March 17, 1879, made an order, reciting the

proceedings in the action and notice of the application, with service of copy of the petition and bond upon the plaintiff's attorney, and directed that the bond be accepted, that the said court would proceed no further in the suit, and declared that the suit *was* removed to the United States Circuit Court for the Southern District of New York (*fo.* 52 *to* 54).

5. A copy of this record, consisting of the summons and pleadings in the action (complaint and answer), petition bond and order of the Court of Common Pleas declaring removal, &c., duly certified by the clerk of that court (*fo.* 54), was filed in the office of the Clerk of the United States Circuit for the Southern District of New York, on *April* 10, 1879 (*fo.* 56); and an order or rule was entered in that court reciting the filing of the record and proceedings, and directing that the appearance of the defendant, the Railroad Company, in the United States Circuit Court, *be, and was thereby entered, and that the action proceed in said court, as if originally commenced therein.*

6. On April 14, 1879, the plaintiff's attorney gave notice of a motion in the United States Circuit Court, to remand the cause to the State Court, upon the grounds: (1) that the proceedings for removal did not show that *at the commencement of the suit* the plaintiff was a citizen of New York, but only showed that he was such a citizen at the time of the application to remove the cause (*fo.* 72); and (2) that the *first* day of the next session of the Circuit Court, after the order of removal of March 17, made in the State Court, was *the seventh* day of April, and that the *record* was not filed or *appearance* entered, until *April* 10 (*fo.* 58 to 62); three days thereafter.

7. In opposition to the motion, defendant's attorney submitted an affidavit, stating, "*that by inadvertance, during his absence from his office on the 7th of April instant*, the record and copy of pleadings was not filed in (the Circuit) court on that day, and that deponent did not discover that the same had not been filed until the 10th inst., thereupon deponent filed the said record in this (the Circuit) court and entered the appearance of the said defendant in this (Circuit) court

by this deponent, as its attorney, &c., and entered a rule that this action proceed in this court, as if originally commenced therein, of which notice was given to the attorney for the plaintiff" (*fo.* 64-5).

8. On May 14, 1879, the Circuit Judge (Blatchford, *J.*), filed a decision and opinion (*fo.* 67 *to* 90), holding: *first*, after a review of the authorities that the suit was within the terms of sec. 2 of the Act of 1875; that the petition and bond were in proper form, &c. (*fo.* 83), and that the suit was one properly removable under the Act of 1875 (*fo.* 85); and, *secondly*, that the defendant had "*lost its right to perfect the removal*," by failure to file the record on the *first day* of the term (*fo.* 88); and that the allegation that by inadvertence the copy of the record was not filed on the first day of the term did not furnish a sufficient excuse to *authorize the court to say that it acquired jurisdiction of the cause by the filing of the copy on the 10th of April;*" and that the case had not been "REMOVED" "*because that had not been done which under sec. 3 of the Act of 1875 authorized the court to proceed in the suit*" (*fo.* 89); and the motion to remand was, therefore, granted, the order of remand being entered on *May* 24, 1879.

9. The cause having been thus remanded to the State Court, (May 24, 1879,) the defendant, on May 28 (four days thereafter), made another petition, duly verified, to the State Court, setting forth the nature of the action, and that the parties *were at the time of the commencement of the action, and still were citizens of different States;* that the action was at issue and untried, and that *there had not been any term of the court since the action was commenced at which it could be tried;* and prayed that it might be removed from that court to the United States Circuit Court for that district. and that the State Court proceed no further in the action (*fo.* 134 *to* 136).

A bond was executed and filed, with surety, conditioned as in the previous bond, for the entry of a copy of the record in the United States Circuit Court on the first day of its next session and appearance of defendant, &c. (*fo.* 137 *to* 140); and on June 2, 1879, upon the petition and bond and recital of the

proceedings, the Court of Common Pleas made an order that the *petition and bond be accepted*, and declaring that the court *would proceed no further* in the suit, the same having been removed to the United States Court (*fo.* 141–142); copies of which petition, bond and order were served upon plaintiff's attorney (*fo.* 143).

10. On *October* 20, 1879 (the *first day* of the next term of the United States Circuit Court). a copy of the pleadings and certified copy of the petition, bond and order were filed in the United States Circuit Court (*fo.* 133 *and* 145), and an order there made and entered that the cause do proceed in said court in the same manner as if it had originally been commenced therein, and that the appearance of the defendant be entered, &c. (*fo.* 147).

11. The plaintiff thereupon moved in the Circuit Court, upon an affidavit setting out the proceedings which had been had, and upon the record, &c., that the cause be remanded to the Court of Common Pleas. The affidavit upon which the motion was based, alleged that there were terms of the Court of Common Pleas in the months of February, March, April, May and June, 1879, respectively, at which the trial of the issues in the action could or might have been had *in that Court*, (*fo.* 152–154); also that the defendant did not petition for the removal of the cause at the time of the entry of its appearance in the State Court pursuant to subdivision 1 of section 639 of the U. S. Revised Statutes, (*fo.* 153).

The defendant opposed the motion with an affidavit showing that the cause could not have been tried at either or any of the alleged terms of the Court of Common Pleas in February, March, April, May or June, 1879, and that there were no such terms of said court at which it could have been tried (*fo.* 157 *to* 166). The suit was not commenced until after the beginning of the *February* Term, nor at issue until its close, and of course could not be put upon the calendar for that term; nor was it at issue in time to be noticed for trial or put upon the calendar for the *March* Term and was not so noticed, or put upon the calendar. Prior to to the *April* Term the Court of Common Pleas had divested

itself of the case; had declared that it was removed to the United States Court, and that it would proceed no further in it, and it was not pending during that term in the State Court, nor upon its calendar, or noticed for trial. The same condition and situation existed during the alleged *May* Term. The cause was not remanded to the State Court in time to be noticed, or put upon the calendar for the *June* Term, and was not so noticed, or put upon the calendar, and was not pending in said court during the *June* Term. On June 2d it was removed from that court to the United States Court, and the State Court had declared that it would proceed no further in it.

12. The Circuit Court (Blatchford, *J.*)—made a decision (*fo.* 168 *to* 177) on this second motion, holding that subdivision 1 of sec. 639 of the U. S. Revised Statutes did not apply to this case, but that it was governed by the Act of March 2, 1875 (*fo.* 170 *and* 171); also that there was no term of the State Court at which the cause could have been tried before the petition of May 28th was filed and the order of June 2, 1879, made, declaring the cause to have been removed to the United States Court, (*fo.* 172), and that "*so far as the question of time is concerned, the new petition was filed in time under the Act of* 1875" (*fo.* 173).

But the court held that the defendant had "*waived its right* to have the cause removed, because it had once *attempted* to exercise the right, and had failed, by neglect, to perfect the removal" (*fo.* 174). It was also held that the then recent decision of United States Supreme Court in the Case of *Meyer* vs. *Construction Co.*, which had been given in this court between the time of the first motion and the decision of the second, to which the attention of the court was called (100 U. S., 475, *Removal Coses*), did not show that the former decision of the court remanding the cause to the State Court for failure to file the record on the first day of the term, was erroneous, (*fo.* 175–177), and the cause was thereupon again remanded to the State Court; the order being made on December 27, 1879 (*fo.* 179–182).

13. The defendant thereupon sued out the writ of error herein to this court to review both of said orders of May

23d (or 24th), and December 27th, pursuant to section 5 of the Act of 1875, the writ being allowed by Judge Blatchford (*fo.* 2), and citation signed, &c., January 3, 1880 (*fo.* 187).

Assignment of Errors.

The plaintiff in error assigns as error in the said orders, and in the decision of the court upon which they were based :

First.—That the Circuit Court erred in holding and deciding that the defendant railroad company (the plaintiff in error) had *lost its right to perfect the removal* of the cause to the United States Court by failure to file the record in that court on the first day of its next term.

Second.—The court below erred in holding and deciding that the allegation of the fact that, by inadvertence, the copy of the record was not filed on the first day of the term, did not furnish a sufficient excuse to authorize the court to say that it acquired jurisdiction of the cause by the subsequent filing of the copy of the record.

Third.—The court erred in holding and deciding that the case in the Court of Common Pleas of the City and County of New York had not been removed into the Circuit Court of the United States for the Southern District of New York, because that had not been done which authorized the court to proceed in the suit; and in not holding that it had been so removed, and that that had been done which did authorize the court to proceed in the suit.

Fourth.—The court below erred in not holding and deciding that, by the proceedings which were had in the action in the Court of Common Pleas, and in the United States Circuit Court, the latter Court had acquired jurisdiction of the cause, and of the parties thereto.

Fifth.—The court below erred in deciding and directing that the cause should be remanded to the Court of Common Pleas, and in making the order of May 24, 1879, remanding the same to the State Court, with costs, &c,

Sixth.—The Circuit Court erred in holding and deciding that the defendant below (the plaintiff in error) had waived its right to have the cause removed to that court from the State Court, because it had once attempted to exercise the right, and had failed to perfect the removal.

Seventh.—The Circuit Court erred in holding and deciding that the defendant (plaintiff in error) had failed *by neglect* to perfect the removal of the cause from the State to the United States Court.

Eighth.—The Circuit Court erred in holding and deciding that the record did not make out a case of accident in failing to file the record in that court on the first day of the term, upon the first removal.

Ninth.—The Circuit Court erred in granting the motion to remand the cause to the State Court, and in making the order of the 27th day of December, 1879, remanding the cause to the Court of Common Pleas of the City and County of New York, with costs, &c.

BRIEF FOR PLAINTIFF IN ERROR.

First.

The plaintiff in error assumes that only such parts of the decision of the Circuit Court are open to review upon the writ of error, in this Court, as are adverse to the contention of the plaintiff in error, (defendant below), and as

are assigned as error, as hereinbefore stated in the foregoing assignments of error.

(Rule No. 21, U. S. Supreme Court, sec. 8.)
Clark v. *Killian*, 103, U. S., 766.
The Enterprise, 2 Curtis, 317.

> The plaintiff below has sued out no writ of error, and cannot here be heard to say that those portions of the decision of the court below which were contrary to the points taken by him as grounds for remanding the cause to the State Court were, or are, erroneous.

In other words:

This court will not, if it should hold that the grounds upon which the Circuit Court remanded the cause to the State Court, as stated in its decisions and hereinbefore assigned as error, were erroneous, look at the other grounds of the decisions of the court, or affirm the order remanding the cause, if such other decisions were erroneous.

We assume, therefore, that it is not necessary to discuss or to seek to establish or uphold here so much of the decisions of the court below as held that the first petition for removal was sufficient in its allegations as to the citizenship of the parties to the action; that the suit was within the terms of section 2 of the Act of 1875; that the petition and bond were in proper form, and that the suit was one properly removable under the Act of 1875; or so much of the second decision as held that subdivision 1 of section 639 of the U. S. Revised Statutes did not apply to this case, but that it was governed by the Act of March 2, 1875; or so much of the decision as held that there was no term of the State Court at which the cause could have been tried before the defendant's petition for removal of May 28, 1879, was made or filed, or the order of the State Court of June 2, 1879, was made, and that so far as the question of *time* is or was concerned, the petition was filed in time, under the Act of 1875.

Those propositions are, therefore, to be regarded for the purposes of this review, as correctly and fully established.

The questions arising on this writ of error are, therefore:

1. Whether the defendant below "*lost its right to perfect the removal*" of the cause by its failure to file the record in the Circuit Court on the *first* day of its next term, after the filing of the petition, &c., for removal in the State Court.

2. Whether the allegation or the fact that by *inadvertence* the copy of the record was not filed on the first day of the next term of the Circuit Court, did not furnish a sufficient excuse to authorize the court to say that it acquired jurisdiction of the cause by the filing of the copy of the record three days thereafter; or whether it did not thereby acquire such jurisdiction.

3. Whether the case had not been in fact and in law actually *removed* into the Circuit Court by what was done; and whether that had not been done which, under section 3 of the Act of 1875, authorized the court to *proceed* in the suit; and whether the court should not, therefore, have retained the cause under the first petition and proceedings, and not have remanded it to the State Court.

4. Whether the defendant below had "*waived its right*" to have the cause removed, because it had once attempted to exercise the right, and had failed to perfect the removal; and whether the court should not have retained the cause upon the second removal, instead of remanding it.

Second.

The writ of error brings up for review the first order of the Circuit Court—that of May 24, 1879—remanding the cause to the State Court, as well as the order of December 27, 1879; and the court will examine that as well as the other.

The fact that no separate writ of error was sued out to review the first order at the time it was entered, or that the defendant, instead of taking such writ of error, renewed or took new proceedings in the State Court to remove the cause to the United States Circuit Court, will not be a bar to the review of the first order remanding the cause, so far as that, if this court should hold that the said order was erroneously made, it may disregard the subsequent proceedings for the removal of the cause from the State Court as unnecessary and immaterial, and the second remand as of no force or effect.

A writ of error brings up the whole record which is open to review in all its parts.

Bank of U. S v. *Smith*, 11 Wheat., 171.
Scott v. *Sandford*, 19 Howard, 393.

Upon a writ of error to a State Court, upon a final judgment there, entered upon a trial, after the refusal of the court to allow the removal of the cause to the United States Court, such refusal of the State Court may be reviewed, and the judgment vacated if the removal was improperly allowed.

The Removal Cases, 100 U. S., 457.
R. R. Co. v. *Koontz*, 104 U. S., 5.

The first order of remand and the proceedings thereon are a material and essential part of the record. They form part of the proceedings upon which the second order of remand was based. That was made expressly and solely upon the ground that the previous order existed; *i. e.*, that because

the case had been once remanded it could not be again removed.

Without the first order, the second could not be upheld, and if this court should see that the first order was erroneous, it would reverse the second order as well as the first, as being founded on an untenable previous decision. It would be an unfounded order.

The writ of error expressly includes the first order of May 23d, as well as the second (*fo.* 1), and was sued out in time as to the first order as well as the second (sec. 1008, R. S.U. S.). It was duly allowed by the Circuit Judge (*fo.* 2); and is a matter of right when sued out in time.

United States v. *Pacheco*, 20 How., 261.
Virginia v. *West*, 19 *Id.*, 182.

Such writs of error are expressly authorized by section 5 of the Act of 1875.

Babbitt v. *Clark*, 103 U. S., 606.
R. R. Co. v. *Koontz*, 104 U. S., 16.

The defendant below properly renewed the proceedings in the State Court to re-remove the cause to the Federal Court, after the making of the first order of remand, instead of immediately suing out a writ of error to this Court to review that order, and without thereby waiving his right to such writ of error, if he should within the statutory time during which it could be sued out, determine to resort to it.

By that order, whether made rightly or not, the cause was remitted to the State Court, and was actually, as a matter of fact in the State Court, by reason of an alleged technical omission to fully complete the proceedings for removal within a particular time. The Circuit Court had held that the case was properly removable; that it was within the jurisdiction of the court, but had not been fully removed, or the removal not fully completed.

If, therefore, the removing party could by renewing or recommencing the proceedings, perfect a complete removal by a full compliance with what the court had said was previously omitted, the end would be accomplished in a much more expeditious way, involving less delay to the parties than

by a writ of error to this court. The defendant or plaintiff in error ought not therefore to be prevented from having a review of the first order. His proceedings did not promote delay, but sought to avoid it.

Third.

The first remand was improperly ordered. The proceedings for removal were properly completed by the filing of the record as and when it was field, and the case was thereby removed.

The plaintiff in error (defendant below) did not *loose the right* to perfect the removal of the cause by the failure to file the record in the Circuit Court on the *first* day of the term.

> The record being in fact filed within a reasonable time thereafter, the Circuit Court acquired jurisdiction of the cause and could have proceeded with it.
>
> This has been expressly held by this court in *Meyer* v. *Construction Company* (100 U. S., 457), where the court says that "it nowhere appears that the Circuit Court is to be deprived of its jurisdiction, if, by accident the party is delayed until a later day in the term," in filing the record.

And also in *Railroad Company* v. *Koontz*, 104 U. S., 5.

The court below put its decision expressly upon the ground that it was *not authorized to say that it had acquired jurisdiction* of the cause by the filing of the copy of the record on the 10th of April (*p.* 88), and that the court was not authorized to proceed in the suit.

In the case of *Broadeax* v *Eisner*, (13 Blatch., C. C. R., 366), cited by the court below, *no record at all* was filed at any time. The question presented in that case was not whether the case had been properly removed, but whether a *certiorari* would issue by the Circuit Court to com-

pel the State Court to give the party that which he already had, viz: a copy of the record. What the court said incidentally about *not* allowing the record to be filed after the first day of the term is *obiter*, and inconsistent with the later decisions of this court.

In the case of *Bright* v. *M. and St. P. R. Co.*, (14 Blatchfd., 214), referred to by the court below, the record was not filed until more than a month after the first day of the term.

In *Kidder* v. *Featteau* (2 Federal Reporter, 616), *McCrary*, Circuit Judge (1880), held that such *unnecessary delay* as amounted to *unexcused* laches in filing the record, whereby the other party is prejudiced, may be ground for remanding the cause, but the party is not entitled for such cause *as matter of right* to have it remanded; and a remand was refused where the record was filed forty-three days after the filing of the petition of removal.

In the case at bar the first day of the next term of the Circuit Court happened to be twenty-one days after the filing of the petition, &c., and the making of the order for removal in the court below. The record was filed within 24 days. No prejudice was shown to have occurred to the plaintiff by the delay of three days. He states none. No prejudice could have resulted. The defendant entered its appearance, and a rule that the cause proceed in the Circuit Court. It could not, therefore, object to proceeding in the Circuit Court.

As the court below stated, it was a removable case, of which the Circuit Court had jurisdiction,—a suit between citizens of different States, involving the requisite amount. The petition and bond were in proper form, and sufficient in every way.

It has been repeatedly held that when a sufficient case for removal is made in the State Court, its jurisdiction ends, and no *order* of the State Court for the removal is necessary.

Hatch vs. *C. R. I. & P. R. R. Co.*, 6 *Blatch*, 105.
Fisk vs. *Union Pacific R. R.*, 8 *Blatch.*, 243, 247.
Removal Cases, 100 *U. S.*, 475.
Kern vs. *Hindekoper*, 103 *U. S.*, 490.
B. & O. R. R. Co. vs. *Koontz*, 104 *U. S.*, 5.

The *order* in this case did not *remove* the case to the Circuit Court. It did not purport to do so. It did not order the case *to be removed.* It merely acknowledged that the case *was* removed already, and placed on the record of the State court the statement of the fact that it had accepted the bond, and declared that it would proceed no further. The order had no affirmative operative effect.

The whole question is more fully decided in this court in the recent case of *Railroad Co*, vs. *Koontz*, at the last term (104 U. S., 5), where the court held: "The entering of the copy of the record in the Circuit Court is necessary to enable that court to proceed, but *its jurisdiction attaches when*, under the law, it becomes the duty of the State Court to proceed no further. The provision of the Act of 1875 * * * * *requires the Circuit Court, when the record is entered there, to deal with the cause as if it had been originally commenced in that court. The jurisdiction is changed* when the removal is demanded in proper form, and a case for removal made. *Proceedings in the Circuit Court may begin when the copy is entered.*"

"The entering of the record is necessary, to perfect the right of the Circuit Court *to proceed, but not for the transfer of jurisdiction.*" "The State Court must stop when the petition and security are presented, and the Circuit Court go on when the record is entered there, which is in effect docketing the cause."

In this case (*R. R. Co. v. Koontz*) the record was not entered in the Circuit Court at all, nor was it in the cases of *Gordon* v. *Longest*, 16 Peters, 104, and *Kanouse* v. *Martin*, 15 How., 209, to which the court refers, and yet it was held that the *Circuit Court acquired jurisdiction* by the proceedings in the State Court, and not by what is subsequently done in the Federal Court.

In *R. R. Co.* v. *Koontz*, this court further said: "It is contended that if the petitioner fails to enter the record and docket, the cause in the Circuit Court on the first day of the next term; the jurisdiction of that court is lost, and there can be no entry on a subsequent day. *Such we do not understand to be the law.* There is nothing in the act of Congress which prohibits the court from allowing it to be

entered on a subsequent day, if good cause be shown." After quoting its decision in the *removal cases*, the court further said: "As has been already seen, the jurisdiction was changed from one court to the other when the case for removal was actually made in the State Court. *The entering of the record in the Circuit Court after that was mere procedure*, in its nature not unlike the pleadings which follow service of process, &c. The failure to file pleadings in time does not deprive the court of the jurisdiction it got through the service of process, but *inexcusable* delay may be good ground for dismissing the cause *for want of prosecution*. If the petitioning party, *without sufficient cause*, fails to enter the record and docket the cause, the suit may be remanded *for want of due prosecution under the removal;* but if sufficient cause is shown for the delay, *there is nothing in the statute to prevent the court from taking the case after the first day of the term*, and exercising its jurisdiction."

Fourth.

The first order of the Circuit Court remanding the cause to the State Court for the reason stated, was not such an exercise of mere judicial discretion, or so entirely a matter of practice as to prevent the review of it by this court.

The court below expressly put its decision that the cause *must* be remanded, upon the ground that the court had not "acquired jurisdiction," and was not authorized to proceed in the suit; and that the cause had *not been removed* (*fo.* 89).

This decision was made before the delivery of the opinion of this court in the *Removal Cases* (100 U. S. 467), holding that the Circuit Court did acquire jurisdiction by a filing of the record *after* the *first* day of the term, &c. Upon the attention of the Circuit Judge being called to it upon the second motion, the opinion having been meantime an-

nounced, the learned judge sought to put his decision upon other grounds than want of jurisdiction; that no case of "*accident*" had been shown, and that the order could not be recalled.

If the Circuit Court had acquired jurisdiction of the case upon the filing of the record, as this court has held in *Meyer* vs. *Construction Co.*, and *R. R. Co.* vs. *Koontz*, that it did, it was not within the *discretion* of the court to decline its jurisdiction and refuse to proceed with the case.

The court did not, in fact direct the remand as a matter of discretion; it did not exercise its discretion in its decision. It decided the matter on the ground of want of power or jurisdiction.

Fifth.

The failure to file the record in the Circuit Court on the first day of the term, was sufficiently excused.

It was shown not to have been intentional (p. 64); but through mistake.

The statement of the Circuit Judge that a case of "*accident*" was not made out is, it is submitted, not justified by the facts appearing in the record. The affidavit of defendant's attorney stated that the record was not filed through *inadvertence*, during his absence from his office on the first day of the term, and the omission was not discovered until three days thereafter when it was immediately filed (p. 64). "Inadvertence" implies want of purpose or design to do the thing which has occurred. If it had been deemed necessary to state in detail the facts as to the occurrence of the inadvertence, it could have been done. But the *fact* of inadvertence was sworn to and not contradicted. It was not a conclusion. There was nothing in the record to impugn the statement.

There was no intention not to file the record, or to waive the right of removal; or not to perfect it. The fact, to which the court below refers (*fo.* 176), that the record had been certified ready to be filed, shows that the intention was that it should be filed when the proper time came. The failure to file it was an unintentional oversight, which was rectified as soon as discovered.

It was within the cases of *Kidder* vs. *Featteau* (3 Federal Reporter, 616), *Meyer* vs. *Construction Co.* (100 U. S. 475), and *R. R. Co.* vs. *Korntz* (104 U. S. 5).

Sixth.

If, however, the orders of the Circuit Court should not be reversed, on the ground that the first order of remand was improperly made; or, if the question to be considered is to be confined exclusively to the second order of remand of December 2, 1879) it is submitted that that order is erroneous, and should be reversed.

The proceedings upon the removal taken in June, 1879, were in all respects regular; were taken in due time and were fully completed by the filing of the record at exactly the proper time.

The learned Circuit Judge held that "*So far as the question of time is concerned, the new petition was filed in time under the Act of* 1875."

That decision in that respect is not open to review here. (See first point.)

As shown in the statement of facts hereinbefore contained (11), the petition was in fact filed in the State Court within the statutory time prescribed by the act, *i. e.*, "before or at the term at which the case could be first tried" in the State Court. It is not necessary here now to prove that

that is so. The facts show it, and the court below has so held; and that fact is not open to review here.

This being so; and the removal being properly and fully completed within due time, it being a removable case, of which the Circuit Court had, and had required jurisdiction —why, if the petition and proceedings were had *in time*, under the act, was the defendant not entitled to maintain the removal?

The ground stated by the Circuit Court was that the defendant had *waived* its right to have the cause removed.

But how? Certainly not by intention. Waiver of a right can only be by some intentional act; or by the doing of some act so inconsistent with the subsequent assertion of the right as to deprive the party otherwise entitled to it of the privilege of enforcing it. To *waive*, in law, is "to abandon, relinquish, or surrender a claim, privilege, or right." (Abbott's Law Dicty., 645.) "Waiver is the passing by of a thing, or a declining or refusal to accept it." Bouvier (Law Dicty., 648) defines *waiver* to be "the relinquishment or refusal to accept of a right." But an unintentional inadvertence or want of purpose or design to do a thing which has occurred is not a waiver or relinquishment of the right to do another thing which was always intended to be done.

There were none of the elements of a waiver in the case at bar. The court below put it upon the ground that because the defendant had once *attempted* to exercise the right of removal and had failed to perfect and complete the removal, as it held, (erroneously, we think), it had waived the right to have any removal at all.

That is; the *unsuccessful attempt* to do a thing, is a *waiver* of the right to attempt to do it again, or of the right to succeed in doing it; or to have the benefit of actually having done it.

The court in effect said: "This is a removable case; you have complied with and completed all the proceedings necessary to remove it, and *have removed* it in due time, and as

prescribed by the act; but you can't have itrem oved, or its removal acknowledged, because you once before attempted to remove it and didn't succeed. Although the time had not gone by within which the case could, under the statute, be removed, and you did in fact remove it, *you have waived the right to have it removed* by not completing the removal before."

It is respectfully submitted that this is substantially a contradiction in terms. "You are in time, but it is too late; you should have completed your previous removal, and not having done so, you can not try again." To say that a party who, in good faith, has intended to remove a cause, but has failed through "*inadvertence*" to effect his purpose, has "*waived*" the right to make a fresh attempt or to have the cause removed, is to say, in effect, that words of opposite significance mean the same thing.

There is nothing in the statute which prohibits a second attempt at a removal, when a first one has not been completed or has failed.

The case of *Hanover Bank* vs. *Smith* (13 Blatch., C. C. R. 224), referred to by the court below, was not similar to the present case. There the court held that a party by *consenting* to a reference of a cause when called for trial, as a condition of postponement, had waived his right to claim a removal under the statute which required the application for removal to be made *before* the trial of the action. Under the circumstances, the court said, the defendant ought to be considered as estopped from making an application to remove the cause. His consenting to a reference, under the circumstances, precludes him from making a subsequent application to remove, &c.

In the case of *Insurance Co.* vs. *Morse* (20 Wall., 445), quoted by the court in *Hanover Bank* vs. *Smith*, this court, per Hunt, *J.*, only held that a party might, *by his own consent*, in a particular suit, submit his case to a special mode of trial, or might *omit to exercise* his right of removal, and so waive the right to which he may be entitled. But in the same case this court held that "the Constitution of the

United States secures to citizens of another State than that in which a suit is brought *an absolute right* to remove their cases into the Federal Court," upon compliance with the terms of the act authorizing it, which could not be impaired or obstructed by State legislation, or even by previous agreement of the party seeking a removal not to avail itself of such right of removal.

To the same effect are the recent decisions of this court in the *Removal Cases* (100 U. S., 475) and *R. R. Co.* vs. *Koontz* (104 U. S., 5), as well as the earlier cases of *Gordon* vs. *Longest* (16 Peters., 97), and *Ins. Co.* vs. *Dunn* (19 Wall., 214), that the removal is a matter of right in the statutory cases.

How can the right to remove the cause be lost, or the delay be legally "prejudicial to the plaintiff," as the court below says (*fo.* 173), if the application is made within the time allowed by law, as the court also says it was? Or how can the allowance of a subsequent removal "make effective the delay of the cause, to the presumed prejudice of the plaintiff, for the time elapsed after the failure to perfect the removal occurred," if, "*so far as the question of time is concerned*," the petition is filed within the time allowed by law?

These are the reasons given by the court below for *remanding* the cause *after* a removal has been completed, and the court is in possession of, and has jurisdiction of the case and the parties. It is not as if the court should in the first instance, if it had the power, upon an application for leave to remove the cause from the State Court, refuse to permit it when the petition was filed. But, having no such power, it remands the cause, because, as stated, of alleged delay occasioned, and which had already occurred, by having to wait for the next term of the Circuit Court to perfect the removal. The only *delay* which has been *made effective* has been that occasioned by the action of the court below in remanding the cause to the State Court in the first instance, instead of retaining it; thus necessitating the repetition of the proceedings for removal, in compliance with the previous requirements of the court as to what it insisted should be done. The second remand has only

made the delay still more effective in preventing a trial of the cause.

The delay of *three days* in filing the record in the Circuit Court in the first instance, which is the foundation of the court's action, was not effective of anything to the presumed or actual prejudice of the plaintiff in any way.

The idea of the court below apparently was that the defendant should be *punished* in some way for not filing the record originally on the first day of the term; that he should not be permitted to correct the error by any subsequent proceedings or restore himself to the position which the court held he had lost by an unintentional omission.

Seventh.

Both of the orders of May 24 and of December 27, 1879, should be reversed, and the cause remanded to the Circuit Court, with instructions to proceed in the cause as if originally commenced therein, as required by law.

Dated October 24, 1882.

C. W. BANGS,
F. L. STETSON,
Of Counsel for the Plaintiff in Error.

108-212

OFFICE SUPREME COURT U. S.
FILED
JAN 8 1883
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

THE ST. PAUL & CHICAGO RAILWAY COMPANY,

Plaintiff in Error,

against

SAMUEL MCLEAN,

Defendant in Error.

No. 174.
Error to the Circuit Court of the United States for the Southern District of New York.

POINTS FOR DEFENDANT IN ERROR ON WRIT OF ERROR, ETC.:

STATEMENT OF FACTS.

This action is brought by the defendant in error against the plaintiff in error to recover $105,000, and interest, on contract.

The defendant, the Railroad Company, answered the complaint on the 27th day of February, 1879.

On the 17th day of March, 1879, the Railroad Company presented to, and filed in, the State Court its bond and petition to remove this cause to the Circuit Court of the United States for the Southern District of New York, and on that day, upon Mr. McLean's default, procured an order from the State Court that the cause be declared removed from said State, to said Circuit Court (fols. 41 to 66).

The copy of the record was certified by the State Court on the 18th of March, 1879 (fol. 61), and the next term of the

Circuit Court of the United States for the Southern District of New York was on the 7th of April, 1879 (fol. 61), but the Railroad Company did not file a copy of the record in the Circuit Court until the 10th day of April, 1879 (fols. 61 and 65).

A motion was made to remand this cause, which was granted for the reason stated in the opinion of His Honor, Judge Blatchford (fols. 67 to 90), and a certified copy of the order thereon (which is set forth at fols. 91 and 92), was filed in the State Court on the 26th of May, 1879, and a copy of the certified copy of said order, with notice of the entry and filing thereof in the State Court was, on the same day, served on the attorney of the Railroad Company (fol. 152). Thereupon, on the 2d day of June, 1879, instead of procuring a writ of error from the decision of the Court remanding said cause from the United States to the State Court the defendant railroad company appeared in and presented its petition to the State Court, in which it alleged "that this action was commenced, and is now pending in the Court of Common Pleas for the City and County of New York" (fol. 134); and, also, its bond, in which it recited this action, *is now pending in the State Court* (fol. 138), and procured an *ex parte* order from said State Court, which recites that "the defendant (railroad company) * * * * having filed a petition in this suit in this Court, * * * * and that this is an action between citizens of different States, * * * * and the said defendant having by said petition prayed for the removal of this suit into the Circuit Court of the United States for the Southern District of New York," thereupon declared that said suit be removed to the said Circuit Court of the United States for the Southern District of New York (fols. 141 and 142), which petition, bond and order are at fols. 134 to 143, and were presented to, and the order was made by, the State Court, without notice to Mr. McLean.

Terms of the State Court were held in the months of February, March, April, May and June, 1879 (fols. 150 to 155). It is true that Mr. Bangs (fol. 157) denies the legal conclusion that the Court was held at which the action could have been tried, *but he does not deny that the Court was in session for the trial of issues of fact during each of said months.*

A motion was made to remand the cause on the second removal to the United States Court, and was granted upon the ground stated by Judge Blatchford at fols. 168 to 177; and the order remanding it was made on the 27th day of December, 1879, and the defendant brought its writ of error, and included both orders in this one writ of error.

POINTS.

I.—The Act of March 3, 1875, provides: "It shall be the duty of the State Court to accept said petition and bond, and to proceed no further in the suit."

Only the petition and bond are necessary, and not an order.

Fulton *vs.* Golden, 8 Reporter, 517;
Dillon on the Removal of Causes (old ed.), pp. 66 and 67, and notes.
The National Steamship Co. *vs.* Tugman (MSS.), decided by this Court Nov. 6, 1882.

And the moment the State Court received the petition and approved the bond it lost jurisdiction.

Dillon on the Removal of Causes (old ed.), page 67, note 107, and also page 76;
Fisk *vs.* Union Pacific R. R. Co., 8 Blatchf., 243, 247.
Mathews *vs.* Lyall, 6 McLean, 13.

No order of removal is necessary.

Hatch *vs.* Chicago, Rock Island and Pacific R. R. Co. 6 Blatchf., 105.

II.—The cause on the first removal was properly remanded because the railroad company did not comply with the statute nor with the terms of its bond,

Bright *vs.* the Milwaukee and St. Paul R. R. Co., 14 Blatchf., C. C. R., 214;
Broadnax *vs.* Eisner, 13 Blatchf., C. C. R., 336 (370);

because the railroad company failed to file the record within twenty days, or on the first day of the Term, as required by §§ 2 and 3 of the Act of 1875, and as also required by its bond,

Kauffman *vs.* McNatt, 3 Cent. Law, J., 408;
Scott *vs.* The Clinton and Springfield R. R. Co., 6 Biss., 259;
See also the reasons stated by Judge Blatchford at folios 86 to 90,

especially as the Clerk of the State Court had certified the record as early as March 18, 1879 (fol. 61).

The railroad company's bond was forfeited by this neglect before the record was filed on April 10, 1879.

(See its terms, fol. 48).
Dillon on Removal of Causes, p. 74.

When the transcript has not been filed in time, it is for the Circuit Court to determine whether it will retain jurisdiction or remand the cause, and its discretion will not be reviewed by this Court.

National Steamship Co. *vs.* Tugman, *supra.*

III.—The railroad company waived its right to the writ of error to review the first order of the Circuit Court by acquiescence in the remand of this action to, and thereafter appearing in, the State Court, and presenting its second petition, in which it alleged that "*the action is now pending in the Court of Common Pleas for the City and County of New York*" (fol. 134), and its bond, which recites that "the action is now pending in the said Court of Common Pleas" (fols. 137, 138), and procuring an *ex-parte* order of the said Court of Common Pleas on the 2d day of June, 1879, "upon the said petition in this suit in this Court" (Court of Common Pleas) (fol. 141), and by procuring a judgment of the said Court of Common Pleas "that the said petition and bond be accepted * * * and that this Court (Court of Common Pleas) will proceed no further in this suit," etc. (fol. 142).

This was an adjudication procured by the railroad company itself that the cause was properly remanded, or was in the State Court after such first remand.

It is both *res adjudicata* and an estoppel of record against the plaintiff in error. It is its act of record.

Dillon on the Removal of Causes, page 74 and notes.

Irregularities are waived if objection is not taken at the proper time.

Decker *vs.* Kitchen, 26 Hun., 173;
Matter of Yates, *id.*, 179;
Pearson *vs.* Lovejoy, 53 Barb., 407.

After choosing to go back into the State Court and taking new proceedings, it is an election to take the first remand as proper. It cannot fall back upon a writ of error to review this, to wit., the first remand.

Scarf *vs.* Jardine (House of Lords), 30 Weekly Reporter, 893.

IV.—The writ of error will not bring up for review the first order of the Circuit Court, because the proper papers to remand the cause to the State Court were filed in the State Court several months before said writ of error was allowed.

Consequently, upon filing the certified copy of the order of the Circuit Court in the State Court, the latter became reinvested with, and the former lost, jurisdiction of the cause; and thereby the cause was no longer in the Circuit Court, and therefore a writ of error to that Court could neither be sued out nor perfected; but if the Railroad Company desired to procure such writ of error, it should have requested that Court to direct the clerk to delay returning the case until it had an opportunity to sue out and perfect a writ of error as to the first removal, as was done in

> Trafton *vs.* Nougues, 13 Pacific Law Rep., 49 S. C., 4 Cent. L. J., 228, cited in Dillon on the Removal of Causes, p. 64, note 102. Id. pp. 67 and 68, note 107, and the 13th point is made a part hereof.

It is very evident that for months after the cause was in the State Court, the Railroad Company did not intend to apply for a writ of error to review the first order remanding the cause.

> See petition and bond for the second removal, reciting that the case is in the Court of Common Pleas; in other words, such writ of error was a mere afterthought.

V.—The decision of the Supreme Court of the United States in the case of

> Meyer *vs.* Construction Co., 10 Otto, 457,

was cited by the Railroad Company on the second motion to remand before Judge Blatchford, and his views are given at folios 174 to 177, and for the reasons there cited the decision in that case is inapplicable, because the Circuit Court was not deprived of its jurisdiction by "accident," and it refused to receive the action after the time, and, as Judge Blatchford aptly remarks, the record was certified March 18, 1879 (the day after the petition and bond were filed in the State Court), and no fact was stated which established any accident. Even in such a case *good cause* must be shown to the Circuit Court, and the Circuit Court must *accept the transfer* after the day and during the term.

> The National Steamship Co., Tugman, *supra;* Meyer *v.* Construction Co., *supra.*

According to that decision the rule is not universal; but in this case, for the reason that no fact was stated showing how any inadvertence arose, but merely a conclusion of inadvertence without showing any facts, and because of the unexcused neglect, the Circuit Court *refused to accept the transfer* after the day, and remanded the case to the State Court, and thereafter the Railroad Company proceeded in the State Court. In Meyer *vs.* The Construction, the clerk made an affidavit that the failure to file the return was his fault (10 Otto, 466 and 475). In this cause there is no excuse, but the contrary.

VI.—The Railroad Company, by making its second application to the State Court for removal, is estopped of record from claiming that the case was improperly remanded on the first application.

Dillon on the Removal of Causes, pp. 73 and 74, and page 76, note 130;
Scarf *v.* Jardine, 30 Weekly Reporter, 893.

VII.- As to the second order remanding the cause, it is submitted that the bond was not such a one as required by § 639 of the Revised Statutes, re-enacted in 1878, nor was the application made in time.

VIII.—Inasmuch as the right to removal is statutory, the plaintiff in error must allege all the facts in its petition which show that it was entitled to removal, among which facts are, that no term has elapsed in the State Court at which the case could have been tried.

Insurance Co. *v.* Pechner, 95 U. S. Repts., 183;
Kaiser *v.* Illinois Cent. R. R. Co., 6 Fed. Reporter, 1.

"The term at which a case can be first brought to trial, within the meaning of section 3 of the Act of March 3d, 1875, is not the term for which the action is noticed for trial, but is the first term after the *issues* are first made up.

Fulton *vs.* Golden, 8 Reporter, 517;
Aldrich *v.* Crouch, 10 Fed. Reporter, 305;
Scott *vs.* The Clinton and Springfield R. R. Co., 6 Biss., 529;
Ames *vs.* Colorado Central R. R. Co., 4 Central Law Jour., 199 (200);
S. C., 9 Chancery Legal News, 132;
Insurance Co. *v.* Suettel, 33 Ohio St. Repts., 278 (280).

Gurnee *v.* Brunswick, 1 Hughes, 270 ;
Babbitt *v.* Clark, 13 Otto, 606;
Wheeler *v.* The Liverpool & London & Globe Ins. Co., 8 Fed. Reporter, 196;
S. C., 10 Insurance Law Jour., 794;
Murray *v.* Holden, 2 Fed. Reporter, 740;
S. C., 10 Reporter, 162;
Dillon on Removal, &c., 57.

And several terms had elapsed at which this case could have been tried (fol. 152 to 154), if this be the correct construction.

IX.—The Railroad Company once had the action removed to the Circuit, and for its neglect the cause was remanded to the State Court.

On such a state of facts a second removal cannot be made, because if the party applying for the removal had the power to procure a second removal by simply giving the necessary bond, and filing a petition in the proper form, and through inadvertence or design fails to file the record on such second removal, and the cause be again remanded therefor, he could have the case removed term after term, and thereby prevent the case from ever coming to trial.

Such a course of procedure will not be allowed, because such delay would be prejudicial to the opposite party; and the Court, to prevent such injustice, has wisely decided that the party who, through his own neglect, once fails to perfect such removal, loses that right for ever.

See Dillon on Removal of Causes, page 74 and notes.
See also the reasoning of Judge Blatchford at folios 173 to 177.

It should be observed that the second removal was perfected before Meyer *vs.* The Construction Co. was decided.

X.—The Court remanded this cause onthe first a pplication, and on filing the order in the State Court, the jurisdiction of the latter Court re-attached, and it can proceed therewith.

Thatcher *vs* McWilliams, 47 Georgia, 306.

XI.—The order made on the first application is, *res adjudicata*, that the action shall be tried in the State Court.

XII.—The railroad company availed itself of the order re-

manding the cause the first time, and acted upon it, which constitutes a waiver.

Gaire *vs.* Goodman, 2 Smith (Eng.) 391;
Pearce *vs.* Chaplin, 9 Q. B., O. S., 802;
S. C. 16 L. J., Q. B., 49.

" Acting on an order is a waiver of the right to appeal."

Taussig *vs.* Hart, 33 Superior Court (N. Y.), 157.

And for a parity of reason, acting on the first order remanding this cause to the State Court is, on the part of the railroad company, a waiver of its right to the writ of error to review it.

See authorities cited in Point III.

It also waived its right to a removal.

Hanover National Bank *v.* Smith, 13 Blatchf., C. C. R., 224;
Hazard *v.* Durant and others, 9 Rhode Island, 602-606;
Home Ins. Co. *v.* Curtis (Sup. Ct. Mich.), 3 Cent. L. J., 27;
Thatcher *v.* McWilliams, *supra.*

The railroad company's conduct is equivalent to a waiver.

Broadnax *v.* Eisner, 13 Blatchf. C. C. R., 336.

The railroad company is estopped by its acts from any right to a second removal.

Scarf *v.* Jardine, *supra.*

XIII.—Before the writ of error was allowed, the two orders remanding the cause had been filed in the State Court, and the United States Circuit Court had lost jurisdiction, and the writ will not lie to it after it has parted with jurisdiction.

Burke *v.* Luce, 1 Coms. (1 N. Y.), 239;
Martin *v.* Wilson, id., 240;
Thatcher *v.* McWilliams, *supra;*
Browder *v.* McArthur, 7 Wheat., 58;
Peck *v.* Saunderson, 18 How., 42;
Washington Bridge Co. *v.* Stewart, 3 How., 413;
Sibald *v.* United States, 12 Peters, 488;
The 4th Point is made a part hereof.

If the State Court loses jurisdiction upon filing the petition and approval of the bond, it must necessarily acquire jurisdiction whenever an order of the Circuit Court reinvesting it with jurisdiction is filed in it. Upon what would the decision of this Court act if the action be rightfully in the State Court? Can it restore a jurisdiction once parted with?

XV.—The writ of error includes two separate and distinct orders made on different facts at different times, and is to review two separate and distinct judicial determinations, which is as much error as to bring one writ of error to review two judgments in two different actions, on the ground that the parties plaintiff and defendant may be the same.

XVI.—The order should be affirmed with costs.

D. M. PORTER,

Of Counsel for Defendant in Error.